IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
AT BEAUMONT

No. 09-13-00251-CV

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Appellant,

v.

COTI MATTHEWS, on behalf of her minor child,
MACY MATTHEWS, et al.,
Appellees.

On Appeal from the 356th Judicial District Court
of Hardin County, Texas
The Honorable Steven R. Thomas, Presiding
Trial Court Cause No. 53526

BRIEF OF APPELLANT KOUNTZE INDEPENDENT SCHOOL DISTRICT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of the case:

This was originally filed as a civil rights suit under the Texas Constitution and Texas law in which the plaintiffs were seeking damages, declaratory and injunctive relief against Kountze Independent School District. (CR 778-802). The nature of the case changed dramatically, though, during a hearing on April 30, 2013, when plaintiffs' counsel submitted a proposed order to Judge Thomas. The proposed order (which was ultimately signed by Judge Thomas on May 8, 2013) was "agreed to in substance and form" by lead counsel for the plaintiffs and for the State of Texas, but not by lead counsel for Kountze ISD. The order denied all relief sought by the parties except for the relief specifically granted by the order and the relief of attorneys' fees. By signing the order, *the plaintiffs agreed to dismissal of all their claims*, except those included in the trial court's summary judgment order. (CR 1034-1036) (Tab 2).

District court:

356th District Court, Hardin County
The Hon. Steven R. Thomas, Presiding

Course of proceedings:

The plaintiffs filed suit against Kountze ISD and former superintendent Kevin Weldon. (CR 2). The plaintiffs subsequently dismissed their claims against Mr. Weldon. (*Cf.* CR 299). Kountze ISD filed a plea to the jurisdiction (CR 90-128), as well as a motion for summary judgment (CR 261). The plaintiffs filed a motion for partial summary judgment. (CR 135). The trial court denied the plea to the jurisdiction and granted, in part, both summary judgment motions. (CR 1034-1035) (Tab 2). *The plaintiffs agreed, in form and substance, to the trial court's order dismissing all relief sought by the plaintiffs, except insofar as it was granted in the summary judgment order.* (CR 1036) (Tab 2). Kountze ISD took this interlocutory appeal. (CR 1044).[1]

[1] *City of Beaumont v. Starvin Marvin's Bar & Grill, LLC*, No. 09-11-00229-CV, 2011 Tex. App. LEXIS 10042, at *1 (Tex. App. – Beaumont Dec. 22, 2011, pet. denied); TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

This case contains a number of substantial shifts that require a more detailed statement of the case than is customary. The identity of the plaintiffs has changed repeatedly, one defendant has been dismissed, various parties have intervened, and the number and type of causes of action has changed throughout the short time that this case has been on file. This confusion is further complicated by *the plaintiffs' agreed dismissal of their claims* in preference for the relief granted in the trial court's summary judgment order. (CR 1034-1036) (Tab 2). Because of such complicating factors, the school district has included a more detailed statement of the case in the Appendix at Tab 1.

STATEMENT REGARDING ORAL ARGUMENT

Kountze ISD believes that the Court's decisional process would be aided by permitting the parties to have oral argument. What is clear from the trial court's decision is that: (1) it denied the school district's plea to the jurisdiction; and (2) it granted, in part, the plaintiffs' motion for partial summary judgment. However, those two facts, alone, are not sufficient to a proper understanding of this appeal in light of two additional facts. First, the plaintiffs' motion for partial summary judgment did not seek any relief requested in the plaintiffs' live pleading nor did it specify the grounds for the relief requested. Second, the trial court denied all other requests for relief (with the exception of attorney's fees). Stated simply, the trial court granted the plaintiffs summary judgment against Kountze ISD on an unknown claim, based on a nonexistent petition, with unknown consequences for Kountze ISD. The confusion in the trial court's order is compounded by inconsistencies in the positions taken by the plaintiffs' counsel. For example, at the summary judgment hearing, plaintiffs' counsel specifically represented to the trial court that the then-proposed order (i.e., the order that the trial court eventually signed) would *not* be a decision holding that the plaintiffs had a free speech right to control the message on the run-through banners. However, after issuance of the order, the same plaintiffs' counsel reportedly publicly stated the exact opposite. Kountze ISD respectfully requests oral argument so that this Court can have a reasonable opportunity to unravel this confusion and render a proper decision.

GLOSSARY

CR	Clerk's Record, cited by page number stamped onto each page (e.g., CR 131).
SCR	Supplemental Clerk's Record, cited by number of supplement and by page number stamped onto each page (e.g., 2d SCR 233).
RR	Reporter's Record, consisting of the hearing transcript from April 30, 2013, cited by page and line number (e.g., RR 68:6). All citations are to the second volume of the Reporter's Record, which contains the entire transcript.
SRR	Supplemental Reporter's Record, consisting of the hearing transcripts from October 4, 2012 (volumes 1-3), and October 18, 2012 (volume 4). Volume 3 of the Supplemental Reporter's Record is not numbered. Volumes 1-3 of the Supplemental Reporter's Record are also located in the Second Supplemental Clerk's Record. (2d SCR 86-287). Citations to Volumes 1-3 are to the copy contained in the Second Supplemental Clerk's Record.
Kountze ISD	Kountze Independent School District, a Texas independent school district governed by an elected Board of Trustees.
Kountze HS	Kountze High School, a high school owned and operated by Kountze ISD.
Kountze MS	Kountze Middle School, a middle school owned and operated by Kountze ISD.
Cheerleader Squad	Kountze HS and Kountze MS each offer cheerleading as a school-sponsored extracurricular activity. The groups of students involved in cheerleading at the two schools are generally referred to as 'cheerleader squads'.
Run-through banners	Signs or banners, generally made out of paper, that are held up for a sports team (e.g., the football team) to run through at the commencement of a game. The banners generally have designs or messages on them connected with athletic excellence, good sportsmanship or school spirit. (*Cf.* 2d SCR 1940-1941).

FFRF Letter	Letter dated September 17, 2012, from a staff attorney with the Freedom from Religion Foundation to former Superintendent of Kountze ISD, Kevin Weldon, alleging that the inclusion of religious verses on run-through banners at Kountze HS football games violates the Establishment Clause of the First Amendment to the United States Constitution. (2d SCR 299-302).
Res. 1	Resolution and Order No. 1, a resolution and order adopted by the Board of Trustees for Kountze ISD on October 16, 2012, that initiated an administrative process to receive evidence, hold hearings and consider whether the Establishment Clause prohibits religious messages on the run-through banners in the context of the Kountze ISD community. (2d SCR 1931-1934).
Res. 3	Resolution and Order No. 3, a resolution and order adopted by the Board of Trustees for Kountze ISD on April 8, 2013, that concludes that the Establishment Clause does not prohibit the inclusion of fleeting expressions of community sentiment, including religious expressions, on the run-through banners in the context of the Kountze ISD community. The Resolution further provides guidance to school personnel that, while they retain the authority to regulate the content of the messages on the run-through banners, such restrictions generally should relate to the overall purpose of run-through banners as part of school sporting events. (2d SCR 1938-1948) (Tab 3).

ISSUES PRESENTED

The plaintiffs, a minority of the members of the cheerleading squads at Kountze High School and Kountze Middle School, brought suit against the school district alleging a wide variety of causes of action. The trial court entered a summary judgment order denying the school district's plea to the jurisdiction and granting, in part, the plaintiffs' motion for partial summary judgment. The plaintiffs claim that they have a legal right to decide what messages are contained on run-through banners displayed on the field at school football games.

The issue presented is whether the trial court erred in denying the school district's plea to the jurisdiction and granting, in part, the plaintiffs' motion for partial summary judgment. Kountze ISD contends that the trial court erred when it denied Kountze ISD's plea to the jurisdiction and when it granted, in part, the plaintiffs' motion for partial summary judgment for the following reasons:

1. There is no case or controversy between the plaintiffs and the school district: the plaintiffs want to display banners containing religious messages and the school district is permitting them to and has no intention of restricting the content of the banners solely because it contains religious material;

2. The school district is entitled to governmental immunity; and

3. The plaintiffs lack standing to challenge the school district's decisions about the messages contained on school run-through banners.

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STATEMENT OF THE FACTS

The Kountze High School cheerleader squad regularly displays run-through banners on the field at high school football games as part of their normal responsibilities. (2d SCR 1940 [Res. 3]) (Tab 3)).[2] A run-through banner is a large paper sign that the cheerleaders hold up on the field at the beginning of the game to get the crowd and the football players excited. (2d SCR 212 [B. Richardson 56:19-23]).[3] The football players run through the banner, shortly after it is held up by the cheerleaders. (*Id.*). It is displayed for up to a couple of minutes before it is destroyed by the football players running through it. (2d SCR 802 [S. Short 74:12-15]).

Such banners have been displayed at the high school football games for decades and generally serve the purpose of encouraging athletic excellence, good sportsmanship, and school spirit. (2d SCR 1940 [Res. 3]) (Tab 3)). Kountze ISD has traditionally entrusted the preparation of such banners to the cheerleader squads, under the authority of their sponsors. (*Id.*). The sponsors are employees of the school district who are paid an additional stipend to oversee and direct the cheerleader squad. (2d SCR 1946). For the middle school cheerleaders, the cheerleader sponsor is generally referred to as "coach" (*see, e.g.*, 2d SCR 1739 [A. Gallaspy 8:11]), while the cheerleader sponsor for the high school squad is, as one cheerleader put it, "my boss." (2d SCR 2046 [A. Jennings 16:16]).

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[2] In fact, the first duty of the cheerleaders, as set forth in the cheerleader squad's rules, is to create run-through banners. (2d SCR 818). The run-through banners for the high school cheerleader squad were prepared at the regular cheerleader squad practices at the high school, in the lobby of the old gym. (2d SCR 171-172 [M. Matthews 15:14-22, 16:9-24]; 2d SCR 253 [B. Richardson 97:5-14]). The Kountze Middle School cheerleader squad also displays run-through banners, though there is less evidence in the record regarding the history of their use of such banners.

[3] Only the cheerleaders, football players, trainers and coaches are allowed on the fields during the run-through banners or even for cheering on the sidelines. (2d SCR 1808 [T. Franklin ¶6]).

The sponsors and the cheerleader squads are expected to exercise good sense in the preparation of the banners, particularly since the banners are displayed in such a public manner as to represent the school itself. (2d SCR 1940-1941).[4] The sponsors are present when the banners are made. The sponsors review and approve the content of the banners after they are finished. (2d SCR 214, 253 [B. Richardson 58:13-17, 97:3-4]).[5] The sponsors would not permit "inappropriate banners," which could include, for example, banners that demonstrated poor sportsmanship or included racial slurs. (2d SCR 254-255 [B. Richardson 98:19 – 99:17]).[6]

Despite these facts, the plaintiffs, a small minority of the students on the high school and middle school cheerleader squads, have claimed that they have a legal right to control the messages displayed on the school's run-through banners.

I. The cheerleader squads are school-sponsored groups engaging in school-sponsored activities.

The cheerleader squads are school-sponsored, organized extracurricular activities of Kountze Middle School and Kountze High School, which are part of Kountze ISD. (2d

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[4] The banners usually contain the school mascot, the lion. (2d SCR 158 [B. Richardson 59:4-7]). While acting as cheerleaders, the members of the cheerleader squads serve as representatives of Kountze ISD. (2d SCR 132 [K. Moffett 39:16-18]; 2d SCR 975 [T. Moffett 17:18-20]; 2d SCR 2061 [A. Jennings 31:5-7]).

[5] (2d SCR 1583 [B. Richardson 178:6-13]; 2d SCR 998 [T. Moffett 110:11-18] (asked to approve each banner)). When the members of the cheerleader squad first thought up the idea of using Scripture verses on the banners, they immediately went to Ms. Richardson and Ms. Moffett for approval because, as one cheerleader put it, "They're my boss." (2d SCR 2032-2033, 2036-2037, 2046 [A. Jennings 2:24 – 3:1, 6:14 – 7:21, 16:16]). One of the plaintiff-cheerleaders explained that Ms. Richardson could have not allowed the banners. (2d SCR 1016 [K. Moffett 56:15-19]). Ms. Richardson and Ms. Moffett loved the idea, but their initial reaction was to check and make sure it was okay so nobody would get in trouble for it. (2d SCR 2073 [M. Jennings 5:11-18]; 2d SCR 2011 [W. Jennings 5:5-7]). Consequently, Ms. Richardson called her boss, the principal at the middle school, to ask him about the idea of using Scripture verses on the banners. (2d SCR 2071 [M. Jennings 3:20-25]; 2d SCR 2011 [W. Jennings 5:10-18]). In the meantime, some of the cheerleaders went to the football coach and some of the football players to make sure that they were okay with the idea. (2d SCR 2074 [M. Jennings 5:4-7]).

[6] (CR 986-987 [B. Richardson 21:19 – 22:16]). Cheerleader sponsor Beth Richardson explained that even inoffensive messages might be inappropriate to place on the banners. (2d SCR 259, 261 [103:18-20, 105:6-8]).

SCR 1940 [Res. 3, pp. 3 and 9]) (Tab 3).[7] During the 2012/2013 school year, the two sponsors for the high school cheerleader squad were Beth Richardson and Tonya Moffett. (2d SCR 123 [K. Moffett 30:11-15]). Ms. Richardson is mother of plaintiff-appellee Rebekah Richardson and Ms. Moffett is mother of plaintiff-appellee Kieara Moffett. (*Id.*; 2d SCR 1420 [B. Richardson 15:6-7]). The sponsor for the middle school cheerleader squad was Sharon Depew. (2d SCR 1805 [S. Depew ¶2]). It is generally up to the cheerleader squad sponsors to decide how to run the cheerleader squads. (2d SCR 258 [B. Richardson 102:22-24]; 2d SCR 989 [T. Moffett 76:16-18]).[8]

The students who participate in or want to participate in the cheerleader squads take part in official, school-supervised activities both during[9] and outside of normal school hours, including tryouts, cheer camp, regular practices, performance at football and basketball games, fundraisers, and performance at pep rallies and at little pep rallies

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[7] (2d SCR 764 [R. Richardson 17:7-10]; 2d SCR 1422 [B. Richardson 17:8-9]; 2d SCR 1432 [B. Richardson 27:2-4]; 2d SCR 973 [T. Moffett 12:8-10]; 2d SCR 985 [T. Moffett 57:14-16]; 2d SCR 1005 [K. Moffett 12:21-23]; 2d SCR 952 [M. Matthews 15:13-17]; 2d SCR 964 [M. Matthews 65:12-14]; 2d SCR 740 [A. Lawrence 11:17-24]; 2d SCR 743 [A. Lawrence 25:16-18]; 2d SCR 929 [N. Bilal 10:10-15]; 2d SCR 937 [N. Bilal 42:15-17]; 2d SCR 793 [S. Short 38:10-11]). "Extracurricular activities" are activities sponsored by the University Interscholastic League (U.I.L.), the Board, or an organization sanctioned by Board resolution. (2d SCR 1825 [KISD Policy FM (Legal), p. 9]). The activity is not necessarily directly related to instruction of the essential knowledge and skills, but may have an indirect relation to some areas of the curriculum. (*Id.*).

[8] Like other athletic programs, the members of the cheerleader squads are held to a higher standard than other students. (2d SCR 752 [A. Lawrence 60:17-23] (cheerleaders held to a higher standard as regards grades; no pass, no play, just like football players); 2d SCR 962-963 [M. Matthews 57:19 – 58:11] (no pass, no play applies to cheerleading, just like other extracurricular activities)). In addition, the cheerleader squad sponsors have the authority to impose regulations that are specific to the cheerleader squads. (2d SCR 965 [M. Matthews 67:15 – 68:9] (sponsors of cheerleaders may establish standards of behavior, including consequences for misbehavior, that are stricter than those for students in general); 2d SCR 1023 [K. Moffett 81:1-9] (Ms. Richardson and Ms. Moffett, as the sponsors of the cheerleaders, have the ability to establish rules and regulations for the cheerleaders); 2d SCR 978-979 [T. Moffett 31:9-24, 32:15 – 33:3] (cheerleaders are given a special position as leaders at the school and, as a result, more can be required of them)).

[9] The high school cheerleader squad participated in at least two types of activities during the school day: pep rallies at the high school and "little pep rally days" at the elementary and intermediate schools. (CR 996-997 [B. Williams ¶¶3-5]; 2d SCR 748 [A. Lawrence 43:23 – 44:1]; 2d SCR 2014 [W. Jennings 8:8-21]).[9] Both the pep rallies at the high school and the "little pep rally days" at the lower schools took place during the school day and

for the lower schools. (2d SCR 135-136 [K. Moffett 42:20 – 43:10]).[10] The cheerleader squads are organized by school officials, from the sign up procedure in the school office,[11] to conducting tryouts,[12] to the annual cheer camp,[13] to the regular practices[14] and performances.[15] (2d SCR 1547 [B. Richardson 141:25 – 142:2]; 2d SCR 989 [T. Moffett 76:16-18]). School officials organize these events and are required to attend them in order to supervise the members of the cheerleader squads. (*See* 2d SCR 1946 [Res. 3, p. 9] (Tab 3)).[16] In turn, students who have been selected to participate in cheerleading are

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required the members of the cheerleader squad to miss class. (*Id.*; 2d SCR 786 [S. Short 12:1-11]).

[10] The "little pep rallies" were cheerleader functions during part of the first period of the school day, during which the cheerleaders would go to the elementary and intermediate schools to work with the kids at the beginning of the school day. (2d SCR 2014 [W. Jennings 8:8-21, 8:25 – 9:2]). The cheerleaders were required to participate in the little pep rallies, even though that involved missing part of their first period class, unless they had permission from the cheerleader squad sponsors and a good excuse to miss. (2d SCR 2015-2016 [W. Jennings 9:25 – 10:6]).

[11] During the spring, the campus principal or some other school official makes an announcement over the school announcement system that students who are interested in participating in cheerleading the following year may sign-up in the office. (2d SCR 1007 [K. Moffett 17:6-17]; 2d SCR 954 [M. Matthews 22:17-22; 23:18-24]).

[12] Interested students who sign-up are notified of when try-outs will occur and when they should report for practice in preparation for try-outs. (2d SCR 790-791 [S. Short 27:7-12 (junior high), 29:15-19 (varsity)]). The try-out practices are organized and overseen by school employees, including the cheerleader squad sponsors. (2d SCR 1466-1467 [B. Richardson 61:24 – 62:5]; 2d SCR 765, 768 [R. Richardson 21:20-22, 31:4-11, 15-17]; 2d SCR 954 [M. Matthews 25:1-7]; 2d SCR 791 [S. Short 30:17-23]; 2d SCR 935, 936 [N. Bilal 34:21 – 35:14; 36:9-11; 38:3-4]; 2d SCR 914 [T. Hadnot 17:15-16]; *see also* 2d SCR 768 [R. Richardson 32:17 – 33:1] (Ms. Tate runs the high school tryout practices and tells the girls what they need to practice for the tryouts); 2d SCR 790-791 [S. Short 28:12-21 (junior high), 29:20 – 30:6 (varsity)] (the cheerleader squad sponsor would select the cheers to perform for tryouts and run the practices)).

[13] (2d SCR 797 [S. Short 54:23 – 55:1, 55:8-10]; 2d SCR 959 [M. Matthews 43:16-21]). Throughout the cheer camp, the cheerleader squad sponsors are present in order to supervise the cheerleader squad and to make sure that the members of the cheerleader squad are there. (2d SCR 797 [S. Short 54:23 – 55:1, 55:8-10]).

[14] (2d SCR 793 [S. Short 39:1-4, 9-11] (Ms. Richardson and Ms. Moffett supervise cheerleader practices, including making sure everyone is present and safe)).

[15] (2d SCR 1504 [B. Richardson 99:9-14] (Beth Richardson stands on the sidelines at football games while the run-through banners are displayed in her capacity as a sponsor to supervise the cheerleaders)).

[16] (2d SCR 1417-1418 [B. Richardson 12:25 – 13:7] (attending all the games is part of the responsibilities of the sponsors); 2d SCR 180 [M. Matthews 24:15-22] (No. 1 rule is no performance or practice without sponsor so not supposed to be doing the banners on their own)). While the cheerleader squad sponsors supervise the practices, the practices of the high school cheerleader squad are generally led by approximately three student-leaders chosen by the cheerleader squad sponsors. (2d SCR 995 [T. Moffett 98:7 – 99:15]). The cheerleader squad sponsors select the student-leaders, generally aiming to include at least one senior in each group of student-leaders and also considering the personalities of the various students. (2d SCR 994, 995 [T. Moffett 93:23 – 94:1, 98:12-15]; 2d SCR 1518, 1519 [B. Richardson 113:21-25, 114:1-14]; 2d SCR 1020 [K. Moffett 69:18-20]; 2d SCR 2017 [W. Jennings 11:13-15]). The student-leaders, in turn, are responsible for "leading out," that is, they would be responsible for making most of the decisions for the week, such as which cheers to do, which dances to do, and what to put on the banner. (2d SCR

expected to fulfill certain duties. (2d SCR 792, 799 [S. Short 35:12-18, 64:13-16]).[17] For instance, the members of the cheerleader squads are required to attend all practices and performances,[18] perform in their full uniforms,[19] cheer at all of the basketball and football games,[20] and participate in additional activities of the squads, such as fundraisers,[21] cheer camp,[22] and pep rallies.[23] In order to miss squad activities, or even come late or leave early, the cheerleaders must get the permission of the cheerleader squad sponsors. (*See,*

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995 [T. Moffett 98:16 – 99:8]; 2d SCR 956 [M. Matthew 31:13-14]). The student-leaders, as a group, would come up with an idea for the run-through banner for that week, and then present that suggestion to the cheerleader squad as a whole. (2d SCR 899 [A. Haynes 14:23 – 15:23]; 2d SCR 1012 [K. Moffett 37:3 – 39:1]). The cheerleader squad, in turn, had the opportunity to consider the suggestion of the student-leaders and to decide, as a squad what to put on the banner. (*Id.*).

[17] (2d SCR 751-752 [A. Lawrence 57:21 – 58:1]; 2d SCR 916 [T. Hadnot 24:20 – 25:15, 39:18 – 40:1]; 2d SCR 905 [A. Haynes 39:23-25]). Pursuant to Kountze ISD policy, the cheerleader squad sponsors may develop and enforce standards of behavior that are higher that the District-developed Student Code of Conduct and may condition membership or participation in the activity on adherence to those standards. (2d SCR 1473 [B. Richardson 68:9-13] (has the ability and authority as a sponsor to develop and enforce standards of behavior that are higher than the student code of conduct); 2d SCR 1835 [KISD Policy FNC (Local), p. 1]; 2d SCR 1840 [KISD Policy FO (Local), p. 3]; 2d SCR 1899 [KHS Student Handbook, p. 29]; 2d SCR 799 [S. Short 64:8-12]).

[18] (2d SCR 135-136 [K. Moffett 42:20 – 43:10]; 2d SCR 148 [K. Moffett 55:16-22] (required to attend all assigned sporting events); 2d SCR 1690 [Rachel Dean 13:1-2] (cheerleaders are required to be at games); 2d SCR 1717 [Reagan Dean 12:14-16] (cheerleaders were required to attend games, unless they had permission from Coach Depew); 2d SCR 1390 [S. Seaman 30:10-15] (cheerleaders required to attend practices and performances, like normal rules for such activities)).

[19] (2d SCR 1587 [B. Richardson 182:14-17] (the cheerleaders are required to be at all games in their uniforms); 2d SCR 131 [K. Moffett 38:22-24] (required to be in uniform at all of the football games)). The cheerleader squad uniforms identify the affiliation of the cheerleaders with the school district, bearing the school colors and emblazoned with "Kountze" or "KHS" on the high school uniforms. (2d SCR 903, 904 [A. Haynes 32:18-21, 36:12-14]).

[20] (2d SCR 1422 [B. Richardson 17:19-21, 113:4-5]; 2d SCR 131-132 [38:25 – 39:1; K. Moffett] (required to cheer at the football games); 2d SCR 1010 [K. Moffett 29:16-18, 30:4-6, 31:10-12]; 2d SCR 956 [M. Matthews 33:9-12]; 2d SCR 1720 [Reagan Dean 15:2-11]).

[21] (2d SCR 136-137 [K. Moffett 43:25 – 44:1]). Members of the cheerleader squads were required to participate in fundraising activities. (2d SCR 149, 173 [K. Moffett 56:10-16; M. Matthews 17:18-20]). Fundraisers generally occurred on school property, such as by selling concessions at school sports games, and the money earned through those sales was deposited in the cheerleading fund maintained by the school secretary. (2d SCR 174 [M. Matthews 18:11-17]; 2d SCR 1019 [K. Moffett 66:17 – 67:9]; 2d SCR 1477-1478 [B. Richardson 72:25 – 73:22]). Discussing the cheerleading fund account maintained by the school district, Ms. Richardson noted that the cheerleader squad raised $1,000 from concessions sales, as well as money from a bake sale. (2d SCR 1602-1603 [B. Richardson 197:17 – 198:3, 199:11-14, 199:25 – 200:19]). Ms. Richardson explained that she was told by the school administration that holding fundraisers for the cheerleader squad was one of her duties as a sponsor. (2d SCR 1468-1469 [B. Richardson 63:19 – 64:8]; *see also* 2d SCR 976 [T. Moffett 21:12-15] (sponsors duties included participation in fundraisers)).

[22] (2d SCR 135-136 [K. Moffett 42:20 – 43:10]; 2d SCR 941 [N. Bilal 60:1-4]).

e.g., 2d SCR 800 [S. Short 67:14-18]). The cheerleaders can be disciplined by the sponsors, including disciplinary actions such as verbal reprimands, "benching,"[24] and being removed from the cheerleader squad for failure to abide by the cheerleader squad rules. (*See*, e.g., 2d SCR 132 [K. Moffett 39:6-15]).[25] Students on the cheerleader squads have been permitted, at times, to earn a state Physical Education credit for their successful participation on the cheerleader squad. (CR 1000 [R. Briggs ¶¶5-6]).[26]

II. There is no "controversy" about whether the cheerleader squads will be permitted by the school district to use religious-themed banners.

On April 8, 2013, the Board of Trustees of Kountze ISD adopted Resolution and Order No. 3, which stated, in part,

> Based on the evidence, including oral and written testimony, submitted to the Board, the Board concludes that school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such message is religious. (CR 1947) (Tab 3).

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[23] (2d SCR 1010-1011 [K. Moffett 32:20 – 33:2] (one of the duties is to attend and lead pep rallies)).

[24] (2d SCR 2058-2060 [A. Jennings 28:10 – 30:5]; 2d SCR 1008 [K. Moffett 21:3-13, 22:12-15]). The cheerleader squad sponsors could even "bench," that is, require a cheerleader to sit out from cheering with the squad, for pouting and a cheerleader could be thrown off the squad for pouting twice. (2d SCR 138-139 [K. Moffett 45:15-23, 46:2-5]).

[25] Before trying out for the cheerleader squads, students are required to sign a document indicating that they have received and agree to abide by the Cheerleader Constitution and the Cheerleader Squad Rules and Regulations. (2d SCR 243 [B. Richardson 87:3-13]; 2d SCR 129-130 [K. Moffett 36:10-20, 37:7-10, 37:13-25] (students signed Cheerleader Constitution and Rules and Regulations); 2d SCR 808-816 [Cheerleader Constitution]; 2d SCR 817-818 [Cheerleader Rules and Regulations]; *see also* 2d SCR 177 [M. Matthews 21:19-22] (signed Constitution prior to try-outs because required to do so); 2d SCR 791-792 [S. Short 32:11 – 33:7]; 2d SCR 770, 777 [R. Richardson 40:3-7, 67:22-24]). The members of the cheerleader squad "agreed to abide by" the Cheerleader Constitution and Ms. Richardson "meant to reserve the right to enforce it." (2d SCR 243 [B. Richardson 87:12-13, 19-21]; 2d SCR 1457 [B. Richardson 52:12-14]). Ms. Richardson reserved the right to enforce any one of the rules, on down to the "the two pouts, you're out rule." (2d SCR 244 [88:18-21].). She further testified that, in fact, she probably did reprimand cheerleaders for pouting. (2d SCR 244-245 [88:22 – 89:3]).

[26] The cheerleader squads serve a variety of purposes, including, but not limited to, teaching student-members to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork and take pride in a quality performance through maintaining high standards. (2d SCR 1940 [Res. 3, p. 3]; *see also* 2d SCR 1022 [K. Moffett 79:18 – 80:1]; 2d SCR 247, 252 [B. Richardson 91:5-10, 15-23, 96:4-24]).

With the adoption of this resolution, there is simply no "controversy" about whether the cheerleader squads will be permitted to display banners with religious messages.

A. The school district received a complaint from an outside group about the banners and the superintendent took temporary measures to resolve the complaint.

The school district received a complaint from an outside group about the banners and the then-superintendent, Kevin Weldon, took temporary measures to resolve the complaint. Mr. Weldon received a letter from a staff attorney with the Freedom from Religion Foundation[27] alleging that the religious messages on the banners violate the Establishment Clause as interpreted by *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). (2d SCR 288 [Weldon ¶3]; 2d SCR 299-300 [FFRF Letter]). Mr. Weldon contacted two attorneys and they each separately advised that it appeared to them that the religious messages on the run-through banners violated the Establishment Clause and that he should not permit them. (2d SCR 289-290 [Weldon ¶¶4-7]).[28] Based on this advice, Mr. Weldon made the decision to restrict the use of religious messages on the run-through banners. (2d SCR 290-293 [Weldon ¶¶8-15]). Mr. Weldon would not have

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[27] The Freedom from Religion Foundation is an advocacy group committed to the principle of separation of church and state. The FFRF appears to regularly send letters to federal, state and local government officials objecting to activities that they believe violate the Establishment Clause. For instance, the FFRF recently sent a letter to the United States Department of State objecting to the inclusion of explicit references to God in United States passports. *See* http://ffrf.org/images/U.S.%20Department%20of%20State%20FOIA.pdf (last visited August 8, 2013).

[28] (2d SCR 1796 [Tilley ¶4]; 2d SCR 1798 [Hunt ¶¶3-4]). Mr. Hunt followed up his conversation with Mr. Weldon with an email explaining that he believed that the religious messages on the run-through banners were prohibited by the United States Supreme Court's decision in *Doe*. (2d SCR 1804). Mr. Hunt explained that the prayer at football games in *Doe* was held to be unconstitutional, "even though the religious activity was initiated, prepared, and delivered by students, without the involvement of sponsors or other district employees." (*Id.*).

restricted the religious messages on the banners except for the legal advice he received. (2d SCR 202 [Weldon 46:8-15]).

Mr. Weldon made his decision before he had an opportunity to consult with the Kountze ISD Board of Trustees. (2d SCR 1942). Anyone who believed that she or he was negatively affected by Mr. Weldon's decision could have filed a grievance with the Kountze ISD Board of Trustees. (2d SCR 1852). To date, no one has ever filed such a grievance about this matter. (*Cf.* 2d SCR 1943).

B. After careful consideration of the evidence, the school district concluded that the complaint against the banners lacked merit.

One of the first things that the school district did after the commencement of this litigation was to ask the trial court to rule on the question of whether the United States Supreme Court's decision in *Santa Fe Independent School District v. Doe* requires the school district to prohibit the religious messages from appearing on the run-through banners. (CR 38-39). As the school district explained, the question of the application of *Santa Fe Independent School District v. Doe* to the case was the only real legal issue that needed to be resolved. (1st SCR 111-113). If *Doe* prohibits the religious content on the banners, then, based on the Supremacy Clause of the United States Constitution, the school district must prohibit the banners. (*Id.*). However, as the school district explained, if *Doe* did not prohibit the banners, then the school district had (and has) no intention of prohibiting such banners. (*Id.*).

In order to ascertain the legality of the run-through banners, the Kountze ISD Board initiated a legislative fact-finding process on October 16, 2012. (2d SCR 1934).

The Board received written submissions, and also held a hearing on February 26, 2013, in order to receive oral testimony. (2d SCR 1938).

After careful consideration of the evidence, the Board made findings of fact. The Board's findings of fact fall into two categories: (1) the Board found that the run-through banners are and always have been the school's banners and the school district and school personnel supervise and have control over the content of the banners; and (2) the Board found that, in the context of the Kountze ISD community, permitting the inclusion of religious messages on the run-through banners constituted a fleeting expression of community sentiment that was not likely to establish a religion nor likely to create the appearance of government endorsement of religion. (2d SCR 1939-1945) (Tab 3).[29]

C. The school district intends to permit banners with religious-themed messages on the same terms as they were allowed prior to the complaint.

The school district intends to permit religious-themed banners on the same terms as they were allowed prior to the FFRF Letter. The school district rejected the FFRF's claim that the banners violate the Establishment Clause (2d SCR 1944-1947) and instructed school personnel that restrictions on the messages contained on the banners should "generally relate to the overall purpose of run-through banners as part of school sporting events," not "because the source or origin of such messages is religious." (2d SCR 1947). Despite the Board's clear statement on the issue, the plaintiffs, inexplicably, would not take "yes" for an answer. The Board made clear that it intended to allow the

[29] The Kountze ISD Board also expressed concern that some members of the Kountze ISD community

banners but the plaintiffs insisted that a controversy remained. The gist of the controversy, at the point just prior to the April 30th hearing, could be summarized as follows: Although the Board believed that it was *allowed* to allow the banners, the plaintiffs insisted that the Board was *required* to allow the banners. The school district contended that the banners were government speech while the plaintiffs contended, until April 30, 2013, that the banners were private speech. After April 30, 2013, the plaintiffs apparently abandoned and waived their contention that the banners were private speech.

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interpreted Mr. Weldon's actions as hostile to religion. (2d SCR 1938, 1943 [Res. 3, pp. 1 and 6]) (Tab 3).

SUMMARY OF THE ARGUMENT

The trial court erred by denying Kountze ISD's plea to the jurisdiction and by granting, in part, the plaintiffs' motion for partial summary judgment. The judgment against the school district should be reversed and all claims against the school district should be dismissed because the trial court lacked jurisdiction. The trial court lacked jurisdiction because: (1) there is no case or controversy; (2) the school district is entitled to governmental immunity; and (3) the plaintiffs lack standing.

The plaintiffs, a small minority of the students on the Kountze ISD high school and middle school cheerleader squads, claim that they have the right to control the content of school banners that are displayed on the field at school football games as part of the opening of the game. Kountze ISD filed a plea to the jurisdiction on all of the plaintiffs' claims, demonstrating that the trial court lacked subject matter jurisdiction and that the plaintiffs' claims against the school district should be dismissed.

The plaintiffs, apparently recognizing the futility of the claims they pled in their petition, filed a motion for partial summary judgment, seeking judgment against the school district on new, unclear and unpled claims. After Kountze ISD objected to the plaintiffs attempt to seek summary judgment on these unpled and unspecified claims, the plaintiffs submitted a proposed "compromise" order to the trial court, that they claimed would resolve the case, supposedly without resolving the underlying legal issues.

Over the school district's objection, the trial court signed the plaintiffs' proposed order, (1) denying Kountze ISD's plea to the jurisdiction, (2) granting, in part, the plaintiffs' motion for partial summary judgment, and (3) dismissing all of the plaintiffs'

pled claims for relief, with the exception of their request for attorney's fees.[30] Because the trial court should have granted Kountze ISD's plea to the jurisdiction and dismissed the plaintiffs' claims, Kountze ISD appealed to this Court.

I. There is no subject matter jurisdiction because there is no case or controversy.

The plaintiffs brought this lawsuit in order to be able to continue displaying religious content in run-through banners at school football games. (*Cf.* 3d SCR 20). The use of religious content on the banners had been temporarily restricted by former superintendent Kevin Weldon due to concerns that the banners might violate the Establishment Clause, though that temporary restriction did not, in fact, prevent the display of banners at any of the football games. (*See* 2d SCR 288-292 [Weldon ¶¶3-13]).

The school district, on its own initiative, conducted legislative proceedings, received oral and written evidence, and made findings of fact, including finding that the banners do not violate the Establishment Clause nor do they raise Establishment Clause concerns. (2d SCR 1938-1948 [Res. 3]) (Tab 3). Consequently, the school district instructed school personnel that the content of the banners should not be restricted solely because it contains religious material. (2d SCR 1947).

The cheerleader squads have never been prevented from displaying religious content on the banners, nor have they been subject to or threatened with any discipline or reprimands for doing so. (2d SCR 1442 [B. Richardson 37:22-24]). Moreover, there is no

[30] The trial court also granted, in part, Kountze ISD's motion for summary judgment on its request for declaratory relief. Kountze ISD's request for declaratory relief is not a claim against the plaintiffs and the grant of summary judgment to Kountze ISD on the declaratory relief claim is not being challenged on appeal by any party.

reason to believe that the school district or any school personnel will, in the future, restrict religious content on the banners. (*See* 2d SCR 1947 [Res. 3, p. 10]) (Tab 3). The simple fact is that the trial court had no jurisdiction to enter a judgment against the school district because there was no live "controversy" to decide. Although there may not be a law which prohibits the plaintiffs from acting irrationally by refusing to accept "yes" as an answer, there certainly is a law that says that they cannot receive a judgment in their favor from a court of law when no actual controversy exists. The plaintiffs' claims should have been dismissed for lack of jurisdiction.

II. There is no subject matter jurisdiction because the school district is entitled to governmental immunity.

The trial court lacked jurisdiction over the plaintiffs' claims because Kountze ISD is entitled to governmental immunity. The trial court's summary judgment order granted, in part, the plaintiffs' motion for partial summary judgment, and, with the express consent of the plaintiffs, dismissed *all* of the plaintiffs' other claims. Consequently, the only claims that remain are those upon which the plaintiffs sought summary judgment.[31]

However, determining which claims the plaintiffs' sought summary judgment on, and, in turn, which claims the trial court granted relief on, is not an easy task because the plaintiffs' motion for partial summary judgment does not identify any pled claims nor does it list the grounds for the motion. Similarly, the trial court's order does not specify

[31] In its plea to the jurisdiction, the school district sought dismissal of all of the plaintiffs' claims. The plaintiffs ultimately agreed to dismissal of all, or at least most, of those claims. (CR 1035-1036) (Tab 3). Consequently, the school district has not briefed those additional claims on appeal. Nevertheless, the school district continues to maintain that it was entitled to dismissal of those abandoned claims based on governmental immunity. (*See* 2d SCR 1299).

the claims that are the basis for the relief granted. The lack of clarity in the plaintiffs' motion for partial summary judgment and in the trial court's summary judgment order make it difficult to determine the nature of the claims that are at issue. Regardless, Kountze ISD is entitled to governmental immunity from (1) the relief obtained by the plaintiffs in the trial court's summary judgment order, and (2) the claims pled by the plaintiffs and, arguably, related to the relief granted by the trial court.[32]

III. There is no subject matter jurisdiction because the plaintiffs lack standing.

Finally, this Court lacks jurisdiction over the plaintiffs' claims because they do not represent the cheerleader squads. Even assuming, *arguendo*, that the banners are "private speech," they would be the "private speech" of the cheerleader squad, not of the individual cheerleaders, because decisions about the content of the banners were up to the squad, not individual cheerleaders. The plaintiffs do not have standing to assert any alleged rights of the cheerleader squad because they are not the entire squad, nor even a majority of the squad.[33]

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[32] While the plaintiffs never asserted in their motion or at the hearing on their motion for partial summary judgment that they were seeking summary judgment on the claims pled in their petition, the school district anticipates that the plaintiffs will make such an argument before this Court. While the school district's ability to respond to such an argument is necessarily hampered by the plaintiffs' failure to comply with the rules regarding summary judgment motions, the school district anticipates that the plaintiffs might argue that they received summary judgment on either their free speech claim under the Texas Constitution or their request for declaratory judgment. Even assuming that the plaintiffs did receive summary judgment on one of these claims, the decision of the trial court should be reversed and judgment should be rendered for the school district because there was no waiver of the school district's entitlement to governmental immunity.

[33] In addition, some of the plaintiffs lack standing because they are no longer on either the middle school or high school cheerleader squads.

STANDARD OF REVIEW

This Court reviews a trial court's ruling on a plea to the jurisdiction de novo. *City of Beaumont v. Starvin Marvin's Bar & Grill, LLC*, No. 09-11-00229-CV, 2011 Tex. App. LEXIS 10042, at *8-*9 (Tex. App. – Beaumont 2011, pet. denied) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004)). A plea to the jurisdiction of a trial court seeks dismissal of the case on the ground that the court lacks subject matter jurisdiction, which is essential to the court's power to decide a case. *Starvin Marvin's*, 2011 Tex. App. LEXIS 10042, at *7-*8 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)). The plaintiff bears the burden of establishing the trial court's jurisdiction over a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

In a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists. *Miranda*, 133 S.W.3d at 227. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 227-228. Affidavits based on incompetent testimony should not be considered. *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App. – Houston [14th Dist.] 2000, no pet.); *Harley-Davidson Motor Co. v. Young*, 720 S.W.2d 211, 213 (Tex. App. – Houston [14th Dist.] 1986, no writ). Such affidavit testimony can include matters such as factual or legal conclusions, *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *McIntyre v. Ramirez*, 109 S.W.3d 741, 749-750 (Tex. 2003), and claims that

contradict prior deposition testimony. *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App. – Houston [1st Dist.] 1997, no pet.).

A plea to the jurisdiction is a proper vehicle for challenging the merits of a claim premised on an alleged violation of constitutional rights. *See Starvin Marvin's*, 2011 Tex. App. LEXIS 10042, at *12-*13 (suit for declaratory relief premised on alleged deprivation of constitutionally protected property interests). In addition, because governmental immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Harris County Flood Control Dist. v. Great Am. Ins. Co.*, 309 S.W.3d 614, 617 (Tex. App. – Houston [14th Dist.] 2010, no pet.); *see also Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999) (per curiam).

ARGUMENT

I. The plaintiffs' claims should be dismissed for lack of jurisdiction because the school district permits the cheerleader squads to display banners with religious content.

The plaintiffs brought suit because former Superintendent Kevin Weldon issued a directive prohibiting student groups from including religious content on school banners, including run-through banners. (CR 13-14 [Orig. Pet.]). The cheerleader squads, of which the plaintiffs are a minority of the members, had previously included religious content on some of the run-through banners displayed at school football games. (2d SCR 1941 [Res. 3]).

Mr. Weldon's directive was issued prior to any consideration of the matter by the Board of Trustees and was issued in response to (1) a letter from a staff attorney from the Freedom from Religion Foundation (FFRF) claiming that the religious content on the run-through banners violated the Establishment Clause, and (2) legal opinions from two school law attorneys that the position taken by the FFRF was likely correct. (2d SCR 290 [Weldon ¶8]; 2d SCR 1941-1942 [Res. 3]).

Even though no one brought a formal complaint to them, the Board, on its own, initiated legislative hearings to gather evidence and consider the issue. (2d SCR 1931-1934 [Res. 1]). After receiving evidence, both written and oral, as well as legal and historical information, the Board concluded that, in the context of the Kountze ISD community, permitting religious content on the run-through banners was not likely to lead to a violation of the Establishment Clause. The Board provided instructions to the superintendent to the effect that restrictions should not be placed on the content of such

banners based solely on the religious content of the banners. (2d SCR 1944-1947 [Res. 3]).

In light of the Board's resolution and the positions taken by the school district in this case, the trial court lacked subject matter jurisdiction over the plaintiffs' claims because there is no likelihood that any school personnel or the Board will interfere with the display of religious messages on the run-through banners.

Under the Texas Constitution, the courts of this state do not have subject-matter jurisdiction unless the litigants to a dispute have standing, and no standing exists unless there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (quoting *Bd. of Water Eng'rs v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955)). This rule also prevails in lawsuits arising under the Texas Bill of Rights. *Kohout v. City of Fort Worth*, 292 S.W.3d 703, 708 (Tex. App. – Fort Worth 2009, no pet.). The plaintiff has the burden of alleging facts that affirmatively establish the trial court's subject matter jurisdiction. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

The plaintiffs complain about the email sent by former Superintendent Kevin Weldon on September 18, 2012, which states,

> Per the advice of TASB legal, please to do not allow any student groups to display any religious signs or messages at school sponsored events. I appreciate your immediate attention and conveying this information to your staff and sponsors of student groups. For example, the run-through signs at the football games. Thank you. (2d SCR 292 and 304).

The plaintiffs have never been prevented from displaying any religious messages on banners at school-sponsored events. (2d SCR 1442 [B. Richardson 37:22-24]).[34] As Mr. Weldon explained, the reason that he sent the email was out of concern that the Establishment Clause might require the school district to prohibit the religious messages on the banners. (2d SCR 288-292 [Weldon ¶¶3-14]).

After carefully considering the evidence, the Kountze ISD Board of Trustees concluded that Mr. Weldon's concern was unwarranted and further concluded that permitting the religious messages on the banners does not create a likelihood of violating the Establishment Clause in the context of the Kountze ISD community. (2d SCR 1944-1945 [Res. 3]) (Tab 3). The Board specifically instructed then-interim Superintendent Reese Briggs that school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious. (2d SCR 1947 [Res. 3]). While the Board and school personnel retain their normal authority over the content of school banners, the Board instructed Mr. Briggs that such restrictions generally should relate to the overall purpose of run-through banners as part of school sporting events. (*Id.*). In other words, the Board's instructions indicate that appropriate school personnel should continue to exercise their normal oversight of the banners,

[34] (2d SCR 1564-1565 [B. Richardson 159:20 – 160:2]; 2d SCR 1025 [K. Moffett 90:20-25]; 2d SCR 962 [M. Matthews 55:20-23]; 2d SCR 755 [A. Lawrence 73:1-4]; 2d SCR 778 [R. Richardson 70:22 – 71:2]; 2d SCR 907 [A. Haynes 46:4-8]; 2d SCR 918 [T. Hadnot 30:19-22]; 2d SCR 946 [N. Bilal 78:15-18]; 2d SCR 1366 [S. Seaman 6:19-21]; 2d SCR 1692 [Rachel Dean 15:4-7]; 2d SCR 1745-1746 [A. Gallaspy 14:10-15, 15:1-7]; 2d SCR 802 [S. Short 75:1-4]; CR 945, 958 [Christy Lawrence 12:13-15, 25:16-19]).

reviewing the banners prior to their display. (2d SCR 214, 253 [B. Richardson 58:13-17, 97:3-4]).[35]

The trial court did not have subject matter jurisdiction because there was no ban in place[36] at the time of the judgment and there is no reasonable likelihood that any improper restrictions will be placed on the display of banners containing religious messages.

II. The plaintiffs' claims should be dismissed for lack of jurisdiction because there is no waiver of governmental immunity.

This trial court lacked jurisdiction over the plaintiffs' claims against the school district because Kountze ISD is entitled to governmental immunity from: (1) the relief granted by the trial court in its summary judgment order; and (2) any claims pled by the plaintiffs that arguably relate to the relief granted by the trial court.

Kountze ISD filed a plea to the jurisdiction, seeking dismissal of all of the claims pled by the plaintiffs. The plaintiffs' response to that plea can best be described as a sort of legal sleight of hand that was designed to distract the trial court from the merits of the school district's arguments and entice the court to "resolve" the case on the basis of new, unplead and unclear claims. To accomplish this, the plaintiffs filed a nominal response to the plea (CR 1285-1298), which specifically incorporated by reference the plaintiffs' motion for partial summary judgment that was filed the same day. After Kountze ISD objected to the plaintiffs attempt to raise unpled claims in their summary judgment

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[35] (2d SCR 1583 [B. Richardson 178:6-13]; 2d SCR 998 [T. Moffett 110:11-18] (asked to approve each banner)).

[36] (2d SCR 1686 [Rachel Dean 9:4-10] (does not know whether there is currently a ban on the banners and has

motion, the plaintiffs proposed that the trial court enter what plaintiffs' counsel described as a "compromise" order. The summary judgment order, the form *and substance* of which the *plaintiffs expressly agreed to*, grants, in part, the plaintiffs' motion for partial summary judgment, and dismisses *all* other claims asserted by the plaintiffs.

In order to understand what claims remain in this case, the Court must start with the summary judgment order and the plaintiffs' motion for partial summary judgment, which establish that, to the extent that the trial court granted the plaintiffs' motion, it was granted as to claims that were not pled in the plaintiffs' live pleading and were not properly before the court. More generally, the plaintiffs' unpled claims did not waive Kountze ISD's entitlement to governmental immunity. However, even assuming, *arguendo*, that the summary judgment order grants summary judgment on a claim actually pled by the plaintiffs, Kountze ISD was entitled to governmental immunity from such claims.

The doctrine of governmental immunity prohibits suits against a governmental entity unless there has been a clear and unambiguous constitutional or statutory waiver of that immunity. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994). Absent such a waiver, a trial court does not have subject matter jurisdiction over a suit against a governmental body. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per

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no reason to doubt the school district's representations that it is not banning them)).

curiam) ("The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission."); *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Fed. Sign*, 951 S.W.2d at 403; *Lamar Univ. v. Doe*, 971 S.W.2d 191, 194 (Tex. App. – Beaumont 1998, no pet.).

In order to overcome the school district's entitlement to governmental immunity, the plaintiffs are required to allege facts that affirmatively demonstrate the trial court's jurisdiction. *See Tex. Parks & Wildlife Dep't v. Garrett Place, Inc.*, 972 S.W.2d 140, 143 (Tex. App. – Dallas 1998, no pet.) ("Unless there is a pleading of consent, the trial court has no jurisdiction to hear the case."); *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *Tex. Natural Res. & Conservation Comm'n v. White*, 13 S.W.3d 819, 822 (Tex. App. – Fort Worth 2000), *rev'd on other grounds*, 46 S.W.3d 864 (Tex. 2001) ("The plaintiff has the burden to allege facts that affirmatively demonstrate the lack of governmental immunity."). More particularly, a plaintiff must establish a prima facie case of entitlement to relief in order to overcome a governmental entity's entitlement to governmental immunity. *State of Texas v. Lueck*, 290 S.W.3d 876 (Tex. 2009); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012).

A. There is no waiver of governmental immunity for the relief granted in the summary judgment order.

The trial court's summary judgment order should be reversed and judgment should be entered for the school district because the school district's governmental immunity has not been waived. The claims made by the plaintiffs against the school district in this

lawsuit were dismissed by the trial court with the agreement, in form *and substance*, of the plaintiffs. (CR 1034-1035 [Summary Judgment Order]) (Tab 2).[37] All that remained after the summary judgment order is that the plaintiffs' motion for partial summary judgment was granted "to the extent consistent with this order of the Court." (CR 1035).[38] In the plaintiffs' motion for partial summary judgment, the plaintiffs sought orders from the court that:

> (1) the Cheerleaders may continue to display religious messages on their banners at KISD sporting events, and (2) KISD violates no law by allowing the Cheerleaders to display religious messages on their banners at KISD sporting events. (CR 156).[39]

Thus, the plaintiffs' motion for partial summary judgment contained two parts: (1) a request for an order permitting the cheerleader squads to continue displaying religious messages on school banners; and (2) a request for an order holding that the school district does not violate the law by permitting the banners. The summary judgment order, however, clearly does not grant the first type of relief requested. There is nothing in the summary judgment order corresponding to the plaintiffs' request for an order that "the

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[37] The summary judgment order states, "All other relief sought by the parties and not expressly granted herein is denied, other than the issue of attorneys' fees, which is reserved for further consideration by the Court." (CR 1035; *see also* RR 70:2-5, 10-12 (Plaintiffs' counsel explained, "We have signed off on that order. And it resolves all the issues in the case, including the Plea to the Jurisdiction and all the other pending – all the pending motions and brings the case to a complete end. ... [T]he only remaining issue that would leave would be the pending attorney's fees issue.")).

[38] In addition, the summary judgment order inexplicably grants the plaintiffs the opportunity to seek an award of attorney's fees. (*Id.*).

[39] In the alternative, the plaintiffs requested that the trial court "grant their Motion for Partial Summary Judgment and find that the Cheerleaders' speech was private speech given in a public forum." (*Id.*). No where in the plaintiffs' motion for partial summary judgment does it ever state that they are seeking judgment on *any* of the claims they alleged in their petition. (CR 135-156; *see also* CR 323-327 [Special Exception]; RR 72, 75-77 (discussion in oral argument)). Rather, as is fairly clear from the motion itself, the plaintiffs abandoned their petition and sought various conclusions of law or findings of fact. (*Compare* CR 135-156 *with* CR 778-802).

Cheerleaders may continue to display religious messages on their banners at KISD sporting events." As to the second part of the plaintiffs' request, the summary judgment order provides, "Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events." (*Id.*). Thus, arguably, the summary judgment order grants relief under the second type of request made by the plaintiffs in their motion for partial summary judgment; namely, a holding that the school district may, legally, permit the banners.

1. Kountze ISD did not consent to trial on the plaintiffs' motion for partial summary judgment and, hence, the school district's governmental immunity is not waived.

Kountze ISD's entitlement to governmental immunity was not waived because the plaintiffs failed to properly plead their claims and the school district did not consent to trial on the plaintiffs' motion for partial summary judgment. *See Garrett Place, Inc.*, 972 S.W.2d at 143.

Kountze ISD filed special exceptions and brought to the trial court's attention numerous deficiencies in the plaintiffs' motion for partial summary judgment, including that (1) the plaintiffs failed to list the grounds for summary judgment, (2) the plaintiffs failed to specify whether the motion was a traditional or no-evidence motion for summary judgment, (3) the motion was based on arguments not raised in live pleading, (4) the motion failed to contain a section setting out the summary judgment standard, (5) the motion was unclear as to what causes of action the plaintiffs were seeking summary judgment on, (6) the motion was unclear as to what relief was being sought, and (7) the motion was unclear as to which plaintiffs were seeking summary judgment. (CR 323-

326). Kountze ISD requested that the trial court sustain its special exceptions both prior to the hearing on the motion for partial summary judgment (CR 327) and at the hearing on the motion (RR 67). When the trial court failed to rule on the special exceptions prior to hearing the motion for partial summary judgment, Kountze ISD objected. (RR 67:24 – 68:4). Ultimately, the trial court took up the special exceptions in its summary judgment order and summarily denied them. (CR 1034 and 1035).

Since Kountze ISD did not consent to trial on the relief requested in the plaintiffs' motion for partial summary judgment and that relief (or, at the very least, the relief that the trial court actually granted) was not pled by the plaintiffs in their petition, the plaintiffs failed to overcome Kountze ISD's entitlement to governmental immunity and the trial court's summary judgment order should be reversed insofar as it grants judgment to the plaintiffs. As to the plaintiffs' pled claims, the plaintiffs expressly agreed to dismissal of those claims. Since the plaintiffs' motion for partial summary judgment did not waive the school district's entitlement to governmental immunity and the plaintiffs agreed to dismissal of all of their other claims, the trial court's order should be reversed and judgment should be rendered in favor of Kountze ISD.

2. The summary judgment order does not grant any relief to the plaintiffs on what was the central argument of their case: their claim that the banners were "private speech."

The school district's entitlement to governmental immunity is even clearer in light of the radically limited relief allegedly granted to the plaintiffs in the summary judgment order. The only relief arguably granted to the plaintiffs is a finding that the school district does not violate the law by allowing the banners, which is precisely what the

school district decided and announced in its Resolution No. 3, adopted *before* the plaintiffs filed their motion for partial summary judgment. Notably missing from the trial court's summary judgment order is a ruling on the primary source of disagreement between the school district and the plaintiffs, namely, whether the school district has ultimate control over the banners because they are "government speech," or whether the banners are largely exempt from supervision by the school district because they are "private speech." On this point of disagreement between the plaintiffs and the school district, *the plaintiffs agreed to a dismissal, in form and substance, of all of their claims.* (CR 1036).

The only portion of the plaintiffs' motion for partial summary judgment that was arguably granted is their request for an order stating: "KISD violates no law by allowing the Cheerleaders to display religious messages on their banners at KISD sporting events." (CR 156). However, Kountze ISD does not claim that it would violate the law by allowing the cheerleader squads to display religious messages on the run-through banners at Kountze ISD sporting events. (*See* 2d SCR 1944-1947 [Res. 3]). Consequently, there is no controversy between the plaintiffs and Kountze ISD on this point.

Also significant, however, is what the summary judgment order does not grant to the plaintiffs. The summary judgment order does not state that "the Cheerleaders may continue to display religious messages on their banners at KISD sporting events" nor does it "find that the Cheerleaders' speech was private speech given in a public forum." (*Compare* CR 156 *with* CR 1034-1035). The central disagreement between the plaintiffs and Kountze ISD has revolved around the question of whether the run-through banners

are, for purposes of First Amendment law, "private speech," as claimed by the plaintiffs, or "government speech," as maintained by the school district. (*See* RR 68:6-9). However, the summary judgment order takes no position on the "private speech" versus "government speech" issue, as is evident from the language of the order itself (CR 1034-1035) and from the description of the order by plaintiffs' counsel in oral argument. The plaintiffs' counsel explained that the order "does not ultimately take sides on that question" of "government speech versus private speech." (RR 68:8-11). The plaintiffs' counsel even described the granting of the summary judgment order as an alternative to deciding whether the banners are "private speech" (RR 90:19-20) and stated that the order only grants relief to the parties "to the extent that they are asking for the same relief" (RR 88:15-16), an admission that there is no live controversy on the issue.

Insofar as *the plaintiffs have agreed to dismissal of all of their claims brought against Kountze ISD* (CR 1035-1036), Kountze ISD's entitlement to governmental immunity from those claims has certainly not been waived.

B. Alternatively, there is no waiver of governmental immunity as to any of plaintiffs' pled claims.

Assuming, *arguendo*, that the summary judgment order grants relief to the plaintiffs on some claim actually pled in a live pleading, Kountze ISD is still entitled to governmental immunity. The school district anticipates that the plaintiffs will argue, for the first time on appeal, that the summary judgment order grants them relief on one of the claims that they pled in the district court. (*Cf.* RR 72:2-4). While their failure to include grounds for the motion for partial summary judgment or explain their motion during the

trial court hearing constitutes waiver, and necessarily prejudices Kountze ISD and violates its right to due process, the only claims made in the plaintiffs' live petition that even arguably relate to the type of legal briefing contained in their motion for partial summary judgment are their free speech claim under the Texas Constitution and their request for declaratory relief. Since Kountze ISD is entitled to governmental immunity from these claims as well, the trial court's summary judgment order should be reversed and judgment should be rendered for Kountze ISD.

1. There is no waiver of governmental immunity as to the plaintiffs' free speech claim.

There is no waiver of governmental immunity as to the plaintiffs' free speech claim because they have not established that the school run-through banners are private, rather than government, speech. In addition, the plaintiffs did not seek summary judgment on their free speech claim and, moreover, are judicially estopped from claiming that the trial court's order decided the private versus government speech issue because plaintiffs' counsel made clear and unequivocal representations to the court that the order did not decide that central legal issue. In explaining the then-proposed order to the trial court, plaintiffs' counsel stated, "the order that's in front of the Court right now actually does not ultimately take sides on" the question of whether the messages on the banners are government speech or private speech. (RR 68:6-11). Plaintiffs' counsel further explained that the order grants the plaintiffs' motion for partial summary judgment and the school district's motion for summary judgment, but only "to the extent that they are asking for the *same* relief." (RR 88:10-16). (emphasis added). Plaintiffs' counsel also

stated that the *alternative* to entering the order that was ultimately signed by the trial court would be to decide the question of whether the banner messages are private speech. (RR 90:19-20) (emphasis added).[40]

Despite the unequivocal representations made by plaintiffs' counsel to the court, the school district anticipates that the plaintiffs will argue on appeal (as they have in the press) that the trial court's order grants them relief under their free speech claim. Regardless, even assuming, *arguendo*, that the summary judgment order grants the plaintiffs judgment on their free speech claim, the summary judgment order should be reversed because the school district's governmental immunity has not been waived. The competent summary judgment evidence demonstrates that the messages on the banners are "government speech," as that term is used in First Amendment jurisprudence. Since the banners are "government speech," that is, speech of individuals acting in their capacities as representatives of the school, constitutional free speech protections are not implicated and none of the cheerleaders, nor the group as a whole, has a constitutional right to control the content of the banners.

[40] Despite the explicit representations made to the trial court about the meaning of the order, plaintiffs' counsel have, on numerous occasions since entry of the order, publicly claimed that the summary judgment order holds that the plaintiffs have a free speech right. *See, e.g.*, "Texas judge rules for cheerleaders in Bible banner suit," Associated Press (May 8, 2013), available at http://www.foxnews.com/us/2013/05/08/texas-judge-rules-for-cheerleaders-in-bible-banner-suit/ (last visited Aug. 20, 2013) ("But [plaintiffs' counsel] said there is no ambiguity in the ruling and that the banners are the cheerleaders' protected private speech. 'We won and they didn't,' he said.").

a. The school district's interpretation of its own policies and its legislative findings of fact are entitled to deference.

(1) The Court should defer to the school district's interpretation of its own policies.

So long as a school district's interpretation of its own rules and policies is reasonable, the Court is required to defer to that interpretation. *See Bd. of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966, 970 (1982) (quoting *Wood v. Strickland*, 420 U.S. 308 (1975), to hold that a federal court should not "substitut[e] its own notions for the school board's definition of its rules" for a court is "ill-advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement").[41] "[I]f the statute can reasonably be read as the agency has ruled, and that reading is in harmony with the rest of the statute, then the court is bound to accept that interpretation even if other reasonable interpretations exist." *City of Plano v. Pub. Util. Comm'n*, 953 S.W.2d 416, 421 (Tex. App. – Austin 1997, no pet.).

The Board of Trustees of Kountze ISD, the only policymaker for the school district, issued Board Resolution and Order No. 3, which authoritatively interprets the application of Kountze ISD policy to the cheerleader squads. (2d SCR 1938-1947). This

[41] As the Texas Supreme Court has explained, an agency's "interpretation of its own regulations is entitled to deference by the courts." *Pub. Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991). And the "law is well settled in this state that an independent school district is an agency of the state." *Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978). Local agencies' construction of their own regulations are entitled to deference. *SWZ, Inc. v. Bd. of Adjustment of City of Fort Worth*, 985 S.W.2d 268, 270 (Tex. App. – Fort Worth 1999, pet. denied); *accord Howeth Invs., Inc. v. City of Hedwig Vill.*, 259 S.W.3d 877, 905 (Tex. App. – Houston [1st Dist.] 2008, pet. denied); *cf.* Tex. Att'y Gen. Op. No. GA-0130 (2003) at 3 ("This office does not ordinarily construe city charters or ordinances, in deference to municipal officials' authority to construe their municipality's ordinances and charters."); *see also* TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: ... (6) administrative construction of the statute.").

Court should defer to the school district's interpretation of its own policy in its application to the cheerleader squads.

(2) The Court should defer to the findings of the Board.

The findings and conclusions of local legislative bodies, such as the Board, are entitled to deference because such bodies are in a better position than the judiciary to gather and evaluate data on local problems. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 440 (2002). This is the same deference that the courts grant to Congress, even when considering issues in which First Amendment rights are implicated. *See id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion)).

b. The plaintiffs do not have a free speech right to use school football banners to communicate their personal messages, whether religious or otherwise.

The plaintiffs' free speech claim is based on a denial of the simple, common sense truth that the cheerleaders are representing and acting on behalf of the school when they engage in their cheerleading activities. As the Fifth Circuit recently held in a case out of nearby Silsbee ISD, cheerleaders do not have free speech rights over when or how they participate in cheerleading activities because they serve "as a mouthpiece" for the school. *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852, 855 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011). The plaintiffs' case is premised on a denial of this simple, obvious truth about cheerleading at public school football games. Instead, the plaintiffs propose that the Kountze cheerleader squads are undirected and unsupervised by any

school officials. Such a claim is nonsensical and is not supported by the evidence. Rather, the evidence establishes the following:

1. When displaying the run-through banners, the members of the cheerleader squads are representing the school district. (2d SCR 1940 [Res. 3, p. 3] (Tab 3)).[42] They only have the opportunity to display the run-through banners because they are on the cheerleader squad (2d SCR 984 [T. Moffett 55:13-16])[43] and displaying the banners is a privilege (*Id.* [T. Moffett 56:3-6]). Other students and the general public are not generally permitted on the football field. (2d SCR 1808 [T. Franklin Aff. ¶6]). In fact, while a privilege, display of the run-through banners is also one of the duties of the cheerleader squads. (2d SCR 131-132, 148 [K. Moffett 38:25 – 39:1, 55:13-15]).[44]

2. The run-through banners were displayed at Kountze ISD football games on the field by the cheerleader squads, who were required to be there and be in uniform. (2d SCR 1587-1588 [B. Richardson 182:14 – 183:8]).[45] The football players, also in uniform, run through the banners. (2d SCR 1946 [Res. 3, p. 9]).[46]

3. The cheerleader squads are organized, extracurricular activities sponsored by the school district. (2d SCR 1940 [Res. 3, p. 3]).[47] The school district

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[42] Cheerleader sponsor Tonya Moffett commented that it is "commonsense" that the cheerleaders represent the school. (2d SCR 975 [T. Moffett 18:5-6]; *see also id.* [T. Moffett 17:18-20] (as cheerleaders, they are representing the school); 2d SCR 132, 135 [K. Moffett 39:16-18; 42:4-6]; 2d SCR 1010 [K. Moffett 29:21-23; 30:7-9]; 2d SCR 2061 [A. Jennings 31:5-7]; 2d SCR 1396 [S. Seaman 36:6 – 37:1] (cheerleaders are required to wear their uniforms, and cannot modify them, because they represent the schools);

[43] (2d SCR 2063 [A. Jennings 33:12-14] (when holding run-through banners, only there because they are cheerleaders); 2d SCR 132 [K. Moffett 39:19-24] (when they go out on the field for the football games and hold the run-through banners, or when they are standing nearby cheering as the banners are displayed, they are on the field because they are cheerleaders)).

[44] (2d SCR 818 [Cheerleader Constitution]; 2d SCR 148 [K. Moffett 55:13-15]; 2d SCR 902 [A. Haynes 29:16-18]). It is, after all, the duty of the cheerleaders to cheer for the team. (2d SCR 1518 [B. Richardson 113:4-5]; 2d SCR 1010 [K. Moffett 29:16-18, 30:4-6, 31:10-12); 2d SCR 956 [M. Matthews 33:9-12]).

[45] (2d SCR 131 [K. Moffett 38:22-24]; 2d SCR 134-135 [K. Moffett 41:21 – 42:3] (all cheerleaders are required to attend the games in uniform, whether or not they are performing); 2d SCR 1690 [Rachel Dean 13:1-2] (cheerleaders required to be at games); 2d SCR 1717 [Reagan Dean 12:11-16] (cheerleaders required to attend games and wear their uniforms at the games); 2d SCR 1715 [Reagan Dean 10:21-23] (cheerleaders in uniform when they are holding up the run-through banners on the field)).

[46] (2d SCR 1759 [A. Gallaspy 28:2-8] (cheerleaders and football players were in uniform when on the field); 2d SCR 1715 [Reagan Dean 10:24-25] (football players in uniform)).

[47] (2d SCR 1422, 1425-1427, 1432 [B. Richardson 17:8-9, 20:25 – 21:5, 21:25 – 22:3, 27:2-4]; 2d SCR 973 [T. Moffett 12:8-10]; 2d SCR 979 [T. Moffett 36:5-10]; 2d SCR 764 [R. Richardson 17:7-10]; 2d SCR 1005 [K. Moffett 12:21-23]; 2d SCR 952 [M. Matthews 15:13-15]; 2d SCR 962 [M. Matthews 57:19 – 58:11]; 2d SCR 964 [M. Matthews 65:12-14]; 2d SCR 740 [A. Lawrence 11:17-24]; 2d SCR 752 [A. Lawrence 60:17-23]; 2d SCR 929 [N. Bilal 10:10-15]; 2d SCR 1899-1900 [KHS Student Handbook, p. 29] (discussion of rules relating to

provides the cheerleader squads with paid sponsors and coaches, funding, space to practice and the opportunity to perform at school district football games. (2d SCR 1946 [Res. 3, p. 9]).[48]

4. The school district, including the paid cheerleader squad sponsors, have the authority to regulate the content of the run-through banners. (2d SCR 1947 [Res. 3, p. 10]). Beth Richardson and Tonya Moffett, the two sponsors for the High School cheerleader squad and mothers of two of the plaintiffs, both believe that they have the authority and should regulate the content of the run-through banners if it contains messages that are unsportsmanlike or otherwise inappropriate, even if the messages are not lewd. (*See, e.g.*, 2d SCR 254-255 [B. Richardson 98:19 – 99:17]).[49]

5. More specifically, Ms. Richardson and Ms. Moffett agreed that they would prohibit the cheerleader squad from displaying a banner that included a message like the following arguably religious message: "Jesus [heart]'s you ... unless you attend Parkview Baptist." (2d SCR 1595 [B. Richardson 190:3-10]; 2d SCR 996 [T. Moffett 103:10 – 105:21]).[50] The news recently reported that students at a public high school in Louisiana displayed such banners at a play-off game against a school called Parkview Baptist. (*Cf.* 2d SCR 1944 [Res. 3, p. 7]).

6. Ms. Richardson and Ms. Moffett approved each one of the banners before it was displayed on the football field. (2d SCR 998 [T. Moffett 110:11-18]).[51] Not only did Ms. Richardson approve each of the run-through banners, but she was specifically asked by the cheerleaders for approval of the idea of using Scripture quotes on the run-through banners. (2d SCR 1513 [B. Richardson 108:11-13]).[52]

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extracurricular activities, including letter jacket requirements for cheerleading).

[48] (2d SCR 244 [B. Richardson 88:3-9] (paid by school district to be cheerleader squad sponsor); 2d SCR 984, 985 [T. Moffett 56:18-24, 60:20-23] (same); 2d SCR 1476 [B. Richardson 71:8-23] (school district provided funds for cheerleader activities, including for cheer camp); 2d SCR 800 [S. Short 66:17-19] (practice held on school property); 2d SCR 174 [M. Matthews 18:11-17] (fundraisers occurred on school property, in the concession stands); 2d SCR 1468 [B. Richardson 63:19 – 64:8] (running fundraiser is one of the duties of the sponsor)).

[49] (2d SCR 1611 [B. Richardson 206:9-13 (checked banners for appropriateness); 82:23 – 83:6 (prohibiting political speech on banners is appropriate); 218:1-5 (bad sportsmanship)]; 2d SCR 996-997 [T. Moffett 104:12 – 105:2]; *see also* CR 986-987 [C. Matthews 21:19 – 22:16]; CR 953-955 [Christy Lawrence 20:4-18, 20:21 – 21:5, 22:5-11); 2d SCR 1377-1378 [S. Seaman 17:25 – 18:3]).

[50] (2d SCR 1622-1623 [B. Richardson 217:13 – 218:9] (Parkview Baptist sign not lewd, just inappropriate)).

[51] (2d SCR 125 [K. Moffett 32:9-13] (Ms. Richardson approved the banners); 2d SCR 173 [M. Matthews 17:9-13] (Ms. Moffett and Ms. Richardson approved the message on the banners); 2d SCR 1583 [B. Richardson 178:6-13] (does not dispute Kieara's testimony that Ms. Richardson approved the banners and approved of the biblical messages on the banners)).

[52] Three of the cheerleaders developed the idea of using biblical quotations on the banners and took the idea to

7. More generally, the cheerleader squad sponsors, as Ms. Richardson and Ms. Moffett agreed, have the authority to institute greater code of conduct restrictions on the cheerleader squad than apply to Kountze High School students in general. (*See, e.g.*, 2d SCR 1899 [KHS Student Handbook, p. 29]).[53]

8. Aside from the normal expectations of any school-sponsored student activity, such as attendance and performance, additional restrictions placed on members of the cheerleader squads include such varied provisions as: (a) members of the cheerleader squads are prohibited from wearing their cheerleading uniforms without the permission of the cheerleader squad sponsors (2d SCR 141 [K. Moffett 48:10-17]); (b) the cheerleader squads are not permitted to practice or perform unless their sponsors are present (2d SCR 180 [M. Matthews 24:15-22]); and (c) the members of the cheerleader squads are not permitted to pout and can be 'benched,' ordered to sit out from cheerleading, or kicked off the team for pouting (2d SCR 244 [B. Richardson 88:18-21]).[54]

Despite what the plaintiffs allege in their pleadings, the facts of the case demonstrate that cheerleading at Kountze ISD is much like other sports at Kountze ISD. The plaintiffs generally referred to cheerleading as a sport (*See, e.g.*, 2d SCR 1005 [K.

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the rest of the squad and to the sponsors to see how they felt about it. (2d SCR 2071 [M. Jennings 3:7-14]). The cheerleaders checked with their sponsors because they wanted to make sure that the idea was okay. (2d SCR 2032-2033, 2036-2037 [A. Jennings 2:24 – 3:1, 6:14 – 7:21]). As one cheerleader put, they went to Ms. Richardson and Ms. Moffett because they are the sponsors, "They're my boss." (2d SCR 2045-2046 [A. Jennings 15:21 – 16:17]). Ms. Richardson and Ms. Moffett responded that they needed to make sure that it would be legal and allowed. (2d SCR 2011 [W. Jennings 5:5-7]). Consequently, they contacted Ms. Richardson's boss, Mr. Ferguson, who was the principal at the middle school to ask him about the idea. (2d SCR 2071 [M. Jennings 3:20-25]; 2d SCR 2011 [W. Jennings 5:10-18]).

[53] (2d SCR 1473 [B. Richardson 68:9-13]; 2d SCR 978 [T. Moffett 30:15-20] (sponsors have authority to decide what behaviors they're going to allow and what they're going to disallow in the cheerleaders); *Id.* [T. Moffett 31:9-24, 32:15 – 33:3] (cheerleaders are given a special position as leaders at the school and, as a result, more can be required of them); 2d SCR 792 [S. Short 35:12-18] (cheerleaders were told by their sponsors, including Ms. Richardson and Ms. Moffett, that, because they are cheerleaders, they are held to a higher standard of behavior); 2d SCR 916 [T. Hadnot 24:20 – 25:15] (Ms. Richardson and Ms. Moffett taught them discipline, team work, good sportsmanship, to be leaders, to carry themselves in light of their special position as cheerleaders, that people look up to and expect more from them as cheerleaders, that, as cheerleaders, they are held to a higher standard, and that they represent the school); 2d SCR 751-752 [A. Lawrence 57:21 – 58:1] (has been told that she is held to a higher standard of behavior because she is a cheerleader); 2d SCR 1023 [K. Moffett 81:1-9] (Ms. Richardson and Ms. Moffett, as the sponsors of the cheerleaders, have the ability to establish rules and regulations for the cheerleaders); 2d SCR 905 [A. Haynes 39:23-25] (sponsors have the ability to make stricter rules)).

[54] One of the cheerleaders confirmed that the sponsors would bench for offenses like 'pouting' and that each cheerleader is just two pouts away from being thrown off the squad. (2d SCR 138, 139 [K. Moffett 45:15-23, 46:2-

Moffett 12:18-20]) and frequently referenced the fact that the same sorts of rules that apply to other sports (basketball, volleyball, track, etc.) apply to cheerleading (*See, e.g.*, 2d SCR 1718 [Reagan Dean 13:2-8]; 2d SCR 1516-1517 [B. Richardson 111:19 – 112:3]).

The plaintiffs cannot establish a prima facie case based on a free speech right. Their speech was not substantially burdened and they do not have a free speech right to use school football run-through banners to communicate their private speech because those banners are the speech of the school.

c. The run-through banners represent the school, not the individual cheerleaders.

The run-through banners represent the school, not the individual cheerleaders. As the Fifth Circuit explained, cheerleaders serve "as a mouthpiece through which [the school district] disseminate[s] speech; namely, support for its athletic teams." *Doe*, 402 Fed. Appx. at 855.

The Free Speech Clause of the First Amendment restricts government regulation of private speech; it does not regulate government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). A government entity has the right to "speak for itself." *Id.* It is entitled to say what it wishes, and to select the views that it wants to express. *Id.*at 467-468. A government entity may exercise this freedom in a variety of

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ways, including when it receives assistance from private sources for the purpose of delivering a government-controlled message. *Id.* at 468.[55]

In the context of a speech by a representative of a governmental entity, the United States Supreme Court explained that public entities may restrict speech that owes its existence to a public employee's professional responsibilities. *Garcetti v. Ceballos*, 547 U.S. 410, 421-422 (2006) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Foote v. Town of Bedford*, 642 F.3d 80, 85 (1st Cir. 2011) (government's interest in ensuring that its agents "sing from the same sheet of music" applies equally to paid and unpaid advisors).[56]

The Kountze High School run-through banners at its varsity football games are government speech under *Summum* and *Garcetti*.[57] The run-through banners are prepared by the Kountze High School Cheerleaders, an official school organization, at their school-sponsored, school-supervised practices on school property. (2d SCR 253 [B.

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[55] This does not mean that there are no restraints on government speech. "For example, government speech must comport with the Establishment Clause." *Id.* In addition, involvement of public officials in advocacy may be limited by law, regulation, or practice. *Id.* And of course, a government entity is ultimately accountable to the electorate and the political process for its advocacy. *Id.* "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.* at 468-469.

[56] While public employees retain constitutional protections for speech unrelated to their work, they do not have the right to perform their jobs however they see fit. *Garcetti*, 547 U.S. at 422; *see also Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007); *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007).

[57] In the trial court, the plaintiffs tried to sidestep the "government speech" doctrine by citing *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), and *Pelt & Skins, LLC v. Lanreneau*, 448 F.3d 743 (5th Cir. 2006). *Johanns* concluded that government-mandated advertising by private parties did cease to be government speech merely because the government solicited assistance from nongovernmental sources in developing specific messages. *Id.* at 563. The Court did not limit the government speech doctrine to speech that is "effectively controlled" or subject to "final approval" by the government. Rather, it held that such speech certainly qualifies as government speech, regardless of whether nongovernmental sources develop the specific message. *Pelt & Skins*, in turn, establishes virtually nothing since it is merely an order from the court of appeals stating that the district court in that case did not have the benefit of *Johanns* when it issued its ruling and, since the case involves a similar government-mandated advertising scheme, remanding it to the district court for resolution. 448 F.3d at 743.

Richardson 97:5-14]).[58] The cheerleaders are generally required to prepare and display the banners. (2d SCR 818) (Tab 5).[59] The banners are displayed on government property (the football stadium), in an area that is not generally accessible to the public (the football field), and at a time when a limited number of individuals are allowed on the field (players, cheerleaders and coaches). (2d SCR 1808 [T. Franklin ¶6]). Moreover, the cheerleader squad sponsors testified that they believe that they have the right to control the content of the banners and stated that they would do so under certain circumstances. (*See supra at* p. 33). In fact, Ms. Richardson and Ms. Moffett testified that they did review and approve *each* of the banners before it was displayed. (*Id.*).

The run-through banners represent the school, not the individual cheerleaders. The school district should be permitted to retain its traditional right to control its own speech.

(1) Run-through banners are not a limited public forum.

The plaintiffs attempt to avoid the "government speech" doctrine by claiming that school banners are a limited public forum. The plaintiffs' limited public forum argument is without merit; it gets the cart before the horse. It is only if the speech is "private speech" that the question of limited public forums becomes relevant. Thus, to argue, as Santa Fe ISD did in *Santa Fe Independent School District v. Doe*, that the "speech" is protected because there is a limited public forum is to entirely miss the point.

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[58] (*See also supra at* p. 1).

[59] (2d SCR 148 [K. Moffett 55:13-15]; 2d SCR 902 [A. Haynes 29:16-18]; 2d SCR 1422-1423 [B. Richardson 17:20 – 18:2]). The fact that the cheerleaders were permitted to make exceptions to this general obligation, does not

The run-through banners, like the football field in general, are not a limited public forum because they have not been opened up for indiscriminate use by the general public. Public schools are not traditional public forums that, "'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). Rather, school facilities may be deemed to be public forums "only if school authorities 'by policy or by practice' opened those facilities '*for indiscriminate use* by the general public,' or by some segment of the public, such as student organizations." *Hazelwood*, 484 U.S. at 267 (emphasis added) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

There is nothing in the record to indicate that the football fields or the run-through banners have been opened up for "indiscriminate use" by the public, or even by the student body or organizations. Only one student group is permitted to display the run-through banners, namely, the cheerleader squad. (2d SCR 1422-1423 [B. Richardson 17:20 – 18:2]; *see also* 2d SCR 1940 [Res. 3, p. 3]). Such limited use of the field does not indicate that the school district intentionally opened a nontraditional forum for public discourse.

The plaintiffs, however, likely will argue that, because they prepare the banners, the banners are "private speech" and, therefore, the fields must be some sort of limited

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mean that it ceases to be one of their duties.

public forum. Such an argument fails for at least two reasons. First, allowance of "limited discourse" does not create a public forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Second, the involvement of the plaintiffs in the preparation of the banners does not convert the banners into private speech. For example, in *Garcetti*, the Supreme Court explained that the speech of an employee in pursuance of the employee's duties is "government speech," despite the fact that it is obviously spoken and intended by the individual employee. 547 U.S. at 421-422 (Tab 7). Moreover, in *Garcetti*, the allegation was that the employee was retaliated against by the employer because the employer did not like or agree with the employee's speech. *Id.* at 413-415. Nevertheless, the speech was "government speech," not "private speech." *Id.* at 421-422. Making the same point in an almost identical legal context to the case at bar (i.e., a cheerleader alleging a violation of her free speech rights), the Fifth Circuit explained that the cheerleader had no speech rights when acting as a cheerleader because she serves "as a mouthpiece through which [the school district] disseminate[s] speech; namely, support for its athletic teams." *Doe*, 402 Fed. Appx. at 855. Even when the speech came from a private source and the government did not formally endorse it, that does not change the fact that it is "government speech." *Summum*, 555 U.S. at 476.

(2) The Texas Religious Viewpoints Anti-Discrimination Act does not apply to the banners and, moreover, does not change the banners into "private speech."

The plaintiffs also mistakenly claim that the Texas Religious Viewpoints Anti-Discrimination Act (RVAA) provides support for their free speech theory. The RVAA

protects private religious speech of students in certain circumstances and in certain forums. *Cf.* TEX. EDUC. CODE §§ 25.151 and .152.[60] However, the plaintiffs' reliance on the RVAA is misplaced because, as is clear from the terms of Kountze ISD's policies implementing the RVAA, the run-through banners are not "student speech" and, consequently, not subject to the RVAA.

The RVAA and Policy FNA (Local) do not apply to the case at bar because the banners are not, under the terms of the policy, an opportunity for students "to publicly speak." (*Cf.* 2d SCR 1940, 1946 [Res. 3, pp. 3 and 9]) (Tab 3). Kountze ISD Policy FNA (Local) creates a limited public forum for student speakers at all school events at which a student is "to publicly speak." (2d SCR 1855) (Tab 4). For purposes of Policy FNA (Local), "to publicly speak" means to address an audience at a school event using the student's own words. (2d SCR 1855). However, "[a] student is not using his or her own words when the student is reading or performing from an approved script, is delivering a message that has been *approved in advance* or otherwise *supervised by school officials*, or is *making brief introductions or announcements*." (*Id.*) (emphasis added).

1. The messages on the banners, and the banners more generally, are approved in advance. (2d SCR 214 [B. Richardson 58:13-17]).[61]

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[60] The RVAA requires public school districts in Texas to create a limited public forum for student speakers "at all school events at which a student is to publicly speak." TEX. EDUC. CODE § 25.152(a). The statute also requires that the school district "provide a method, based on neutral criteria, for the selection of student speakers at school events." *Id.* at (a)(2). The statute provides a model policy, but school districts are not required to adopt it. *See* TEX. EDUC. CODE §§ 25.155 and .156. Pursuant to its obligations under the RVAA, the Kountze ISD Board adopted Policy FNA (Local). (2d SCR 1855-1859).

[61] (2d SCR 1583 [B. Richardson 178:6-13]; 2d SCR 998 [T. Moffett 110:11-18]; *see also* 2d SCR 173 [M. Matthews 17:9-13]).

2. The messages on the banners, and the preparation of the banners generally, are supervised by school officials. (2d SCR 1579-1580 [B. Richardson 174:24 – 175:4, 175:20-25]; 2d SCR 180 [M. Matthews 24:15-22]).

3. The display of the banners serves as a brief introduction to or announcement of the football team. (2d SCR 212 [B. Richardson 56:19-23]).

In addition, students are eligible to use the limited public forum created by Policy FNA (Local) if they: (1) are in the highest two grade levels of the school; (2) volunteer; and (3) are not in a disciplinary placement at the time of the speaking event. (2d SCR 1855). Eligible students who wish to volunteer shall submit their names to the campus principal during the first full week of instruction each semester. (*Id.*). The names of the students who volunteer to speak shall be randomly drawn until all names have been selected; the names shall be listed in the order drawn. (2d SCR 1855). The District shall repeat the selection process at the beginning of each semester. (*Id.*). However,

1. The members of the cheerleader squad are not drawn from the highest two grade levels, but from the entire student body and the cheerleader squad includes students who are not in the highest two grade levels. (*See supra* at fn. 12-13).

2. Neither the members of the cheerleader squads, nor any other students, are permitted to volunteer to select and prepare run-through banners. Rather, preparation of the run-through banners is one of the duties of the cheerleader squad and has been for decades. (*See supra* at fn. 45).

3. Neither the members of the cheerleader squads, nor any other students, submit their names to the campus principal in order to be able to prepare the run-through banners. (2d SCR 1507 [B. Richardson 102:3-6]).

4. The names of the individuals who will prepare the run-through banners are not randomly drawn. Rather, the members of the cheerleader squads are selected through a competitive selection process and the weekly team leaders are selected entirely by the choice of the two cheerleader squad sponsors. (*See supra* at fn. 12-13 and 17).

Since neither the RVAA nor FNA (Local) applies to the run-through banners, they likewise do not create a limited public forum on the run-through banners.[62] As the Fifth Circuit recently pointed out, a cheerleader serves "as a mouthpiece" through which *the school district* disseminates speech; namely, support for its athletic teams. *Doe*, 402 Fed. Appx. at 855. There is nothing in the RVAA or Policy FNA (Local) that destroys a school district's ability to control its own speech, no matter who is serving as its mouthpiece. (*Cf.* 2d SCR 1940, 1946 [Res. 3, pp. 3 and 9]) (Tab 3).

d. Converting the banners into private speech would open them up to racist and other offensive messages.

If the plaintiffs in this case have a free speech right in the use of the banners, then various offensive messages must be permitted. As a general rule, "the First Amendment prohibits the state from interfering with the expression of unpopular, indeed offensive, views." *Cason v. Jacksonville*, 497 F.2d 949, 952 n.9 (5th Cir. 1974) (quoting *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1016 (4th Cir. 1973)). Where ever the government creates a public forum for private speech, "[r]acist and other hateful views can be expressed" and "the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that may hurt." *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996).

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[62] The plaintiffs seemed to argue, in the trial court, that somehow the RVAA and the school district's policies converted the banners into student speech. In particular, the plaintiffs pointed to the fact that the school district does not cover all of the costs associated with the cheerleader squads (e.g., families pay for uniforms and for some supplies). The plaintiffs reliance on funding is misplaced for two reasons: (1) the cheerleader squads were partially funded by the school district, e.g., through a direct monetary allowance, through pay for squad sponsors, and through use of school facilities; and (2) as the United States Supreme Court has held, the fact that a private party paid for or developed a particular message does not convert government speech into private speech. *Summum*, 555 U.S. at 468 (Tab 9) (holding that privately donated monuments, including monument of the Ten Commandments,

While schools have greater control over private speech during school-sponsored events, that control is not unlimited. For instance, the United States Court of Appeals for the Second Circuit held that a school cannot "punish a student for wearing a T-shirt depicting a martini glass and 'lines' of cocaine next to an image of George W. Bush." *R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 540 (2d Cir. 2011) (citing *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006)). Similarly, schools generally must permit students to wear t-shirts displaying the confederate flag. *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 542-43 (6th Cir. 2001); *Pounds v. Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901, 914 & n.5 (S.D. Tex. 2007) (citing *Castorina* but stating that a "different standard would apply if the speech could have been viewed as school-sponsored"). Most recently, the United States Court of Appeals for the Third Circuit, sitting en banc, held that a school district could not prohibit middle school students from wearing bracelets that contained the phrase "I [heart] boobies" because the bracelets were "student speech." *B.H. v. Easton Area Sch. Dist.*, No. 11-2067, 2013 U.S. App. LEXIS 16087, at *2-*4 (Aug. 5, 2013).

Neither of the cheerleader squad sponsors, Beth Richardson and Tonya Moffett, believe that the cheerleader squad has the authority to display offensive, racist or even unsportsmanlike or other inappropriate messages on the run-through banners. (*See supra* at p. 33). Their belief that such banners should not and need not be allowed is clearly correct. Kountze ISD is not required to permit banners that contain "I [heart] boobies" or

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were government speech).

any other vulgar, unsportsmanlike or inappropriate message. Kountze ISD is permitted to institute such regulations because the banners represent the school; they are, in legal terms, "government speech."

2. There is no waiver of governmental immunity as to the plaintiffs' request for declaratory relief.

There is no waiver of governmental immunity as to the plaintiffs' request for declaratory relief. In the plaintiffs' Fifth Amended Petition, the plaintiffs requested a declaration that the school district's actions and interpretation of Policy FNA (Local) and FNA (Legal) violated Chapter 25 of the Texas Education Code and also that the school district's actions violate state law, including the Texas Constitution and various portions of the Texas Civil Practice and Remedies Code. (CR 795-796). In their Sixth Amended Petition, the plaintiffs added a new request for declaratory relief, seeking a declaration that display of the religious banners is permissible under the Texas Constitution and Texas state law. (CR 1019).

a. The plaintiffs agreed to dismissal of their requests for declarations that the school district's actions and interpretations of policy violate Texas law.

There is no waiver of governmental immunity as to the plaintiffs' request for a declaration that the school district's actions and interpretations violated Texas law (CR 795-796) because *the plaintiffs agreed, in form and substance, to dismissal of these requests for declaratory relief.* (CR 1034-1036) (Tab 3). There is nothing in the summary judgment order indicating that the school district violated any constitutional provision, any statute or misinterpreted any policy. (*Id.*). While the summary judgment

order grants the plaintiffs' motion for partial summary judgment in part, it does so only to the extent "consistent with" the summary judgment order. "[A]ll other relief sought by the parties and not *expressly* granted" is denied. (CR 1035) (emphasis added). Since the summary judgment order does not expressly grant the plaintiffs' request for a declaration that the school district's actions and interpretations violated Texas law, the trial court denied any such request *and the plaintiffs agreed, in form and substance, to the trial court's decision.* (CR 1036). Since the plaintiffs agreed to dismissal of this request for declaratory relief, there can be no valid waiver of the school district's governmental immunity with respect to that claim.

b. The Sixth Amended Petition is not properly before the Court because it was filed after the summary judgment hearing without seeking or obtaining leave of the trial judge.

There is no waiver of governmental immunity as to the plaintiffs' request for a declaration that display of the religious banners is permissible under the Texas Constitution and Texas state law because the Sixth Amended Petition, where this request is first pled, was not properly before the trial court. The Sixth Amended Petition was filed on May 3, 2013, but the hearing on the plaintiffs' motion for partial summary judgment occurred on April 30, 2013. (*Compare* CR 1001 *with* CR 1034). Because the Sixth Amended Petition was filed after the hearing on the plaintiffs' motion for partial summary judgment, and the plaintiffs neither sought nor obtained leave from the trial judge to file their Sixth Amended Petition, it cannot be considered in connection with the grant (in part) of the plaintiffs' motion for partial summary judgment. *See* TEX. R. CIV. P.

166a(c); *Hussong v. Schwan's Sales Enters.*, 896 S.W.2d 320, 323 (Tex. App. – Houston [1st Dist.] 1995, no writ); *Leinen v. Buffington's Bayou City Serv.*, 824 S.W.2d 682, 685 (Tex. App. – Houston [14th Dist.] 1992, no writ) (appellant courts will assume leave was denied unless grant of leave is evident in record).

c. Alternatively, even if the plaintiffs' request for declaratory relief is properly before the Court, there is no waiver of governmental immunity.

Even assuming, *arguendo*, that the plaintiffs' request for declaratory relief that the religious banners to not violate the Texas Constitution or Texas law is properly before the Court, the school district's governmental immunity is, nevertheless, not waived. There is no waiver of governmental immunity for such claims against the school district because the plaintiffs are not (1) persons interested under a deed, will, written contract, or other writings constituting a contract, or (2) persons whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise and (3) the plaintiffs do not seek to have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise. TEX. CIV. PRAC. & REM. CODE § 37.004(a).

First, the school district is entitled to governmental immunity from the plaintiffs' declaratory relief claim because the plaintiffs are not persons interested under a deed, will, written contract, or other writings constituting a contract in this lawsuit. TEX. CIV. PRAC. & REM. CODE § 37.004(a). Plaintiffs' request for declaratory relief simply does not implicate any such applicable writing under which the plaintiffs are interested.

Second, the school district is entitled to governmental immunity from the plaintiffs' declaratory judgment claim because the plaintiffs are not persons whose rights, status, or other legal relations *are affected* by a statute, municipal ordinance, contract, or franchise. TEX. CIV. PRAC. & REM. CODE § 37.004(a). A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). A declaratory judgment will declare the rights, duties, or status of the parties only in an otherwise justiciable controversy. *Frasier v. Yanes*, 9 S.W.3d 422, 427 (Tex. App. – Austin 1999, no pet.).

The plaintiffs' request for a declaration that the religious banners are permissible under the Texas Constitution and Texas state law does not relate to any justiciable controversy for two reasons: (1) no party has contended or alleged that the banners violated or might violate the Texas Constitution or Texas state law; and (2) such a declaration has no bearing on the actual point of disagreement between the plaintiffs and the school district, namely, whether the banners constitute "government speech" or "private speech."

Third, the school district is entitled to governmental immunity from the plaintiffs' declaratory judgment claim because plaintiffs do not seek a determination on any question of construction or validity of an instrument, statute, ordinance, contract, or franchise. "A declaratory judgment should not be rendered when there is no claim that a statute or a deed is ambiguous or invalid." *Boatman v. Lites*, 970 S.W.2d 41, 43 (Tex. App. – Tyler 1998, no pet.). While some Texas courts have held that the declaratory

judgments act may be used in suits against governmental entities to clarify constitutional imperatives, such claims concern whether an instrument, statute, ordinance, contract, or franchise of the governmental entity violates a plaintiff's constitutional rights. *See City of Austin v. Democracy Coalition*, No. 03-05-00284-CV, 2005 Tex. App. LEXIS 9244, *9 (Tex. App. – Austin Nov. 2, 2005, no pet.). This is not the case with the plaintiffs' vague new requests. The plaintiffs' requests do not concern the violation of constitutional rights. Rather, the plaintiffs' requests merely seek declarations that the *plaintiffs'* acts are *permissible* under unspecified portions of the Texas constitution and unspecified Texas state laws. In other words, the request for declaratory relief does not seek a declaration as to whether the *school district's* actions or policies are permissible under any constitutional provision.

III. The plaintiffs lack standing to challenge the school district's regulation of its own banners.

The trial court lacked subject matter jurisdiction because, on the plaintiffs' own theory of the case, they lack standing to sue on behalf of the cheerleader squad. The plaintiffs allege that the cheerleader squad, by unanimous decision, would select, prepare and display the "run-through banners." (2d SCR 1012 [K. Moffett 37:3 – 39:1]). In other words, no individual cheerleader had the right or authority to decide on the content of *any* message contained on the run-through banners. (*Id.*).[63] Any free speech "right,"

[63] The middle school cheerleader squad prepared the banners in a slightly different manner, though, as with the high school cheerleader squad, no individual cheerleaders had the right to decide what to put on the banners. Rather, the middle school cheerleader squad would select two students each week to be responsible for preparing the banner. (*Cf.* 2d SCR 1749-1750 [A. Gallaspy 18:4 – 19:3]; 2d SCR 1714 [Reagan Dean 9:18-20]). Ayiana Gallaspy and Reagan Dean are the only two plaintiffs who were on the middle school cheerleader squad. (2d SCR 1079).

consequently, would have to be a "right" of the cheerleader squad, not of any individual cheerleader. The plaintiffs are not the cheerleader squad, they are a small minority of the members of the cheerleader squad, and there is no evidence to suggest that they have the authority to act on behalf of the cheerleader squad itself, much less act on behalf of the squad in regard to an issue that requires the unanimous consent of the members of the squad.[64]

Even assuming, *arguendo*, that the banners are "private" as opposed to "governmental" speech, it would be the speech of the squad, not of the individual cheerleaders. Absent statutory authority, neither common law nor equity give the members of an organization the right to sue on that organization's behalf. *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990) (applying this rule to a corporation and their shareholders).[65] Moreover, the current cheerleader/plaintiffs include only three of the

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Reagan Dean, however, is no longer on the cheerleader squad. (2d SCR 1712 [Reagan Dean 7:3-9]). As a result, there is only one plaintiff who is a member of the middle school cheerleader squad. (*See* 2d SCR 1805-1806 [Depew ¶4]).

[64] The Court also lacks subject matter jurisdiction because some of the plaintiffs are no longer on the cheerleader squad and, consequently, lack standing to seek declarative or injunctive relief against Kountze ISD. The cheerleader/plaintiffs currently include: (1) Macy Matthews; (2) Reagan Dean; (3) Ashton Lawrence; (4) Kieara Moffett; (5) Rebekah Richardson; (6) Ayiana Gallaspy; and (7) Savannah Short. Macy Matthews, Kieara Moffett, Rebekah Richardson and Savannah Short were on the high school/varsity cheerleader squad, while Reagan Dean and Ashton Lawrence were on the middle school cheerleader squad. The cheerleading season for the 2012/2013 school year was over prior to the entry of judgment. (*See* 2d SCR 1520 [B. Richardson 115:6-13]; 2d SCR 993 [T. Moffett 92:9-11]). For the 2013/2014 school year, Rebekah Richardson, Ashton Lawrence and Reagan Dean are no longer on either of the cheerleader squads. (2d SCR 1464 [B. Richardson 59:18-25]; 2d SCR 1805-1806 [S. Depew ¶4]). Consequently, the Court lacks subject matter jurisdiction over all requests for injunctive or other prospective relief by Rebekah Richardson, Ashton Lawrence and Reagan Dean.

[65] *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 221-22 (5th Cir. 1994) (holding that *Wingate*'s precedent applies to determining whether a limited partner has standing to directly sue for injuries to the partnership); *Hall v. Douglas*, 380 S.W.3d 860, 873 (Tex. App. – Dallas 2012, no pet.) (citing *Wingate* and holding that "[a] limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner's interest"); *Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468, 472 (Tex. App. – Dallas 2008, pet. denied) (holding that even where the member-plaintiffs' loss was "indirect to and duplicative of" the entity's right of action" the members still lacked standing); *cf. Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257, 264 (Tex. App. – Houston [14th Dist.] 1992, no writ) (concluding that "the common law rule that *all* partners can bring suit

eighteen cheerleaders who will be on the high school cheerleader squad during the 2013/2014 school year. (*See* 2d SCR 1080).

The plaintiffs appear to be arguing that the cheerleader squad constitutes some sort of private association, separate and apart from its existence as a school-sponsored group. The plaintiffs, along with the other members of the cheerleader squad, then "speak" collectively through the run-through banners. Assuming, *arguendo*, that the cheerleader squad constitutes some sort of private association, the plaintiffs do not have standing to bring suit so as to assert the alleged free speech rights of this alleged "cheerleader association" because the "association" makes its decisions unanimously and because the plaintiffs represent only a small minority of the "association."

CONCLUSION AND PRAYER

This Court should reverse the decision of the trial court to the extent that it granted summary judgment to the plaintiffs. The judgment against Kountze Independent School District should be vacated, all claims against Kountze ISD should be dismissed and judgment should be rendered in favor of Kountze ISD.

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themselves on behalf of the partnership is still in force" (emphasis added)); *see also R2 Enters. v. Whipple*, No. 2-07-257-CV2008, Tex. App. LEXIS 4780 (Tex. App. – Fort Worth June 26, 2008, pet. denied) (declaring that an "individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity" and citing multiple reported cases).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a true and correct copy of Brief of Appellant Kountze Independent School District has been mailed, faxed, or hand delivered to all attorneys of record, in compliance with Texas Rules of Appellate Procedure 9.5, the 22d day of August, 2013, as follows:

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APPENDIX

SUPPLEMENTAL STATEMENT OF THE CASE

I. The parties to the case.

The identity of the plaintiffs in this case has changed substantially during the less than one year time period since this lawsuit was filed, but has generally consisted of members or formers members of the Kountze High School or Middle School cheerleader squads, and some of their parents.[1]

When this litigation started, the plaintiffs included nine of the eighteen cheerleaders on the Kountze High School cheerleader squad, one of the fifteen cheerleaders on the Kountze Middle School cheerleader squad, as well as twelve parents of plaintiff-cheerleaders. (3d SCR 4-8). Currently, the plaintiffs include three cheerleaders on the Kountze High School cheerleader squad, two former members of the Kountze High School cheerleader squad, one cheerleader on the Kountze Middle School cheerleader squad, and one former member of the Kountze Middle School cheerleader squad. (CR 779-782).[2] None of the parents are plaintiffs any longer. (*Id.*). For the convenience of the Court, Kountze ISD provides the following chart of plaintiffs who are or were cheerleaders on one of the Kountze ISD cheerleader squads:

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[1] Amy Killough also brought suit on behalf of herself and her daughter Allison Killough. (3d SCR 5-6 [Orig. Pet. 2.9 and 2.10]). However, Allison Killough was not a member of either of the cheerleader squads and both Amy and Allison Killough were dropped from subsequent petitions. (*Id.*; 2d SCR 1079).

[2] (2d SCR 1080; 2d SCR 1805-1806 [Depew ¶4]).

Chart of Plaintiffs Past and Present

Name	Squad	Current Member of a Squad	First Petition Named as a Plaintiff	First Petition Omitted from Plaintiffs, if Applicable
Macy Matthews[3]	High School	Yes	Orig. Pet.	n/a
T'Mia Hadnot[4]	High School	Yes	Orig. Pet.	5th Amend. Pet.
Adrianna Haynes[5]	High School	Yes	Orig. Pet.	4th Amend. Pet.
Morgan Derouen	High School	No	Orig. Pet.	3d Amend. Pet.
Ashton Lawrence[6]	High School	No	Orig. Pet.	n/a
Kieara Moffett[7]	High School	Yes	Orig. Pet.	n/a
Rebekah Richardson[8]	High School	No	Orig. Pet.	n/a
Savannah Short[9]	High School	Yes	Orig. Pet.	n/a
Nahissa Bilal[10]	High School	Yes	Orig. Pet.	5th Amend. Pet.
Cassandra Page	High School	Yes	1st Amend. Pet.	3d Amend. Pet.
Ayiana Gallaspy[11]	Middle School	Yes	Orig. Pet.	n/a
Reagan Dean[12]	Middle School	No	1st Amend. Pet.	n/a
Kennedy Flower	Middle School	Yes	1st Amend. Pet.	3d Amend. Pet.
Kaylee LeDoux	Middle School	Yes	1st Amend. Pet.	4th Amend. Pet.
Teyonce McDaniel	Middle School	Yes	1st Amend. Pet.	4th Amend. Pet.

Defendants Past and Present

This lawsuit was filed on September 20, 2012, against the school district and then-superintendent Kevin Weldon, in his individual and official capacities. (CR 8-9). All claims against Mr. Weldon were subsequently dismissed with prejudice. (3d SCR 28).

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[3] Macy and her mother were deposed. (2d SCR 948-969; CR 966-990). Also, Macy testified at the injunction hearing on October 4, 2012. (2d SCR 161-181).

[4] T'Mia was deposed. (2d SCR 910-923).

[5] Adrianna was deposed. (2d SCR 895-909).

[6] Ashton and her parents were deposed. (2d SCR 737-758; CR 918-928; CR 934-960).

[7] Kieara and her mother, Tonya Moffett, one of the sponsors of the high school cheerleader squad, were deposed. (2d SCR 1003-1027; 2d SCR 971-1000). Also, Kieara testified at the injunction hearing. (2d SCR 115-152).

[8] Rebekah and her mother, Beth Richardson, one of the sponsors of the high school cheerleader squad, were deposed. (2d SCR 760-781; 2d SCR 1406-1629). Also, Ms. Richardson testified at the injunction hearing. (2d SCR 209-262).

[9] Savannah and her mother were deposed. (2d SCR 783-805; 2d SCR 1954-1975).

[10] Nahisaa was deposed. (2d SCR 926-946).

[11] Ayiana and her mother were deposed. (2d SCR 1732-1764; 2d SCR 1361-1400).

[12] Reagan and her mother were deposed. (2d SCR 1706-1726; 2d SCR 1678-1700).

Intervenors

The State of Texas intervened in the lawsuit on October 17, 2012 (1st SCR 240)[13] and the Jennings (Randall Jennings, Michaele (Missy) Jennings, Ashton Jennings, and Whitney Jennings) intervened in the lawsuit on April 16, 2013. (1st SCR 429 and 432). Ashton and Whitney Jennings are members of the Kountze High School cheerleader squad. (1st SCR 431). Neither the State of Texas nor the Jennings brought any claims against the school district. (1st SCR 240 and 432).

II. Procedural history of the case.

A. The plaintiffs' petitions.

The plaintiffs brought suit against Kountze ISD and Kevin Weldon on September 20, 2012. (3d SCR 2). That same day, the trial court issued an *ex parte* temporary restraining order against Kountze ISD and Kevin Weldon. (CR 22). Apparently no effort was made to notify the general counsel of Kountze ISD regarding the hearing. On October 4, 2012, the trial court heard testimony and the temporary restraining order was extended until October 18, 2012. (1st SCR 271). On October 18, 2012, the trial court issued a temporary injunction. (CR 58).

The plaintiffs filed an original petition and six amended petitions.[14] For the convenience of the Court, the school district provides the following chart showing the causes of action and relief requested by the plaintiffs in their various petitions.

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[13] The constitutionality of the RVAA is not be challenged by any of the parties to this litigation.

[14] Original Petition (3d SCR 2-27); First Amended Petition (1st SCR 34-69); Second Amended Petition; (1st SCR 254-288); Third Amended Petition (CR 63-89); Fourth Amended Petition (CR 299-322); Fifth Amended Petition (CR 778-802); Sixth Amended Petition (CR 1001-1025).

Chart of Plaintiffs' Petitions

	Or.	1st	2d	3d	4th	5th	6th
Causes of Action							
1. Art. I, § 6 of the Texas Constitution [free exercise of religion]	x	x	x	x	x	x	x
2. Art. I, § 8 of the Texas Constitution [free speech]	x	x	x	x	x	x	x
3. Art. I, § 3 of the Texas Constitution [equal protection]		x	x	x	x	x	x
4. Ch. 106 of the Texas Civil Practice and Remedies Code [discrimination because of religion]	x	x	x	x	x	x	x
5. Ch. 110 of the Texas Civil Practice and Remedies Code [Texas Religious Freedom Restoration Act]	x	x	x	x	x	x	x
6. Ch. 25 of the Texas Education Code [Religious Viewpoints Anti-Discrimination Act]		x	x	x	x[15]	x	x
7. Texas Civil Practice and Remedies Code – Ch. 37, Uniform Declaratory Judgments Act, seeking a declaration that "Defendant Weldon's conduct and actions as described as *ultra vires*...."				x			
Relief Requested							
Actual Damages	x	x	x	x	x	x	x
Nominal Damages					x	x	x
Declaratory Relief (a declaration that defendants' "conduct and actions ... described herein violate state law.")	x	x	x	x	x	x[16]	x[17]
Injunctive Relief	x	x	x	x	x	x	x
Attorney's Fees	x	x	x	x	x	x	x

[15] In their Fourth Amended Petition, the plaintiffs modified their claim based on the Religious Viewpoints Anti-Discrimination Act from a claim based directly on Chapter 25 of the Texas Education into a request for declaratory relief under Chapter 37 of the Texas Civil Practice and Remedies Code. In their Fourth, Fifth and Sixth Amended Petitions, the plaintiffs sought a declaration that Kountze ISD's "interpretation of KISD's policies FNA(LOCAL) and FNA(LEGAL) violate Chapter 25, Subchapter E of the Texas Education Code." (2d SCR 317, 795-796 and 1018-1019).

[16] In their Fifth Amended Petition, the plaintiffs slightly modified the declaratory relief they were seeking. Whereas in all prior petitions, the request sought a declaration that defendants' "conduct and actions ... described herein violate state law," the Fifth Amended Petition adds, "to include the Texas Constitution, article I, sections 3, 6, and 8, and sections 106.001 *et seq.* and 110.001 *et seq.* of the Texas Civil Practice and Remedies Code." (2d SCR 796).

[17] In their Sixth Amended Petition, the plaintiffs substantially modified the declaratory relief they were seeking, adding two additional paragraphs describing additional types of declaratory relief sought. (2d SCR 1019 [6th Amend. Pet. ¶¶12.3-12.4]). This additional relief seeks declarations that the banners displayed during the 2012 football season did not violate the Texas Constitution or Texas state law and that future similar banners are permissible under the Texas Constitution and Texas state law. (*Id.*).

Plaintiffs' Sixth Amended Petition Was Not Timely and Properly Filed

While the plaintiffs filed a Sixth Amended Petition, that pleading was filed without leave of court after the hearing on the plaintiffs' motion for partial summary judgment, and hence cannot be considered in regard to the grant, in part, of the plaintiffs' motion for partial summary judgment. *See* TEX. R. CIV. P. 166a(c); *Hussong v. Schwan's Sales Enters.*, 896 S.W.2d 320, 323 (Tex. App. – Houston [1st Dist.] 1995, no writ). The plaintiffs did not seek leave to file their Sixth Amended Petition and, as the record makes clear, no such leave was granted. *Leinen v. Buffington's Bayou City Serv.*, 824 S.W.2d 682, 685 (Tex. App. – Houston [14th Dist.] 1992, no writ) (appellant courts will assume leave was denied unless grant of leave is evident in record).

B. The school district asks for declaratory relief.

On October 3, 2012, less than two weeks after the lawsuit was filed, the school district filed a claim for declaratory relief, asking the trial court to decide whether the school district could permit religious messages on "run-through" banners without violating the Establishment Clause of the First Amendment to the United States Constitution. (CR 38-39) The school district's request for declaratory relief was not brought against the plaintiffs, as is clear from the fact that the plaintiffs never filed an answer to the request.

In pleadings and in hearings, the school district explained that the only issue that needed to be decided was whether the Establishment Clause permits the religious messages on the "run-through" banners. For instance, at the temporary injunction

hearing on October 4, 2012, Mr. Brandt, lead counsel for the school district, explained, "if Your Honor determines that the Establishment Clause allows the board members – allows Kountze ISD to allow the banner, then we have every intention of allowing the banners." (1st SCR 112-113).

At the conclusion of the temporary injunction hearing, the trial court continued the hearing, granted a two week extension of the temporary restraining order, and granted leave to the parties to submit additional briefing. (1st SCR 271). Before the hearing reconvened, the school district filed a motion for preliminary declaratory relief, in which the school district asked the trial court to issue a preliminary ruling on the question of whether the religious messages on the "run-through" banners violated the Establishment Clause. (CR 44).

At the reconvened hearing on October 18, 2012, Kountze ISD asked the Court to deny the plaintiffs' request for a temporary injunction. Significantly, Kountze ISD also asked the trial court to grant its motion for preliminary declaratory relief, holding that the Establishment Clause should not be interpreted so as to prohibit the religious messages on the "run-through" banners. (SRR 4:13 and 15). Again Mr. Brandt explained, "[I]f this Court should decide that *Santa Fe v. Doe* does not require the banners to be prohibited, then they won't be prohibited." (SRR 4:21). Inexplicably, the plaintiffs' counsel opposed the school district's motion and asked the court to grant their request for a temporary injunction. The trial court granted the plaintiffs' request for a temporary injunction. (SRR 4:31).

C. The parties seek dismissal of the case.

The trial court conducted hearings on April 30, 2013, and May 7, 2013, to consider various dispositive motions, including (1) the school district's plea to the jurisdiction, filed March 25, 2013 (2d SCR 9),[18] (2) the plaintiffs' motion for partial summary judgment, filed April 9, 2013 (CR 135),[19] and (3) the school district's motion for summary judgment on its request for declaratory relief, filed April 15, 2013 (3d SCR 31). The hearing on the plaintiffs' motion for partial summary judgment was held on April 30, 2013. (RR 66). At the hearing, the school district objected to the trial court's failure to rule on its special exceptions to the plaintiffs' motion for partial summary judgment prior to considering the plaintiffs' motion for partial summary judgment. (RR 67-68).

As already mentioned, the plaintiffs' Sixth Amended Petition was filed after the hearing on the plaintiffs' motion for partial summary judgment and the plaintiffs neither sought nor received leave from the trial court to file the new petition.

1. The school district's plea to the jurisdiction.

- Kountze ISD's plea to the jurisdiction, filed March 25, 2013. (2d SCR 9).
- The plaintiffs' response to Kountze ISD's plea to the jurisdiction, filed April 23, 2013. (2d SCR 1285).
- Kountze ISD's supplement to its plea to the jurisdiction, filed April 29, 2013. (2d SCR 1299).
- Kountze ISD's second supplement to its plea to the jurisdiction, filed April 30, 2013. (2d SCR 1981).

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[18] The school district filed supplemental briefing and evidence to its plea to the jurisdiction. (CR 915, 2d SCR 1299, 1981, 1285).

[19] The school district filed special exceptions to the plaintiffs' motion for partial summary judgment, objections to the plaintiffs' summary judgment evidence, and a response to the motion. (CR 323, 353, and 369).

- Kountze ISD's third supplement to its plea to the jurisdiction, filed May 6, 2013. (CR 915).

2. The plaintiffs' motion for partial summary judgment.

- The plaintiffs' motion for partial summary judgment, filed April 9, 2013. (CR 135).
- Kountze ISD's special exceptions to the plaintiffs' motion for partial summary judgment, filed April 18, 2013. (CR 323).
- Kountze ISD's objections to the plaintiffs' summary judgment evidence, filed April 18, 2013. (CR 355).
- Kountze ISD's response to the plaintiffs' motion for partial summary judgment, filed April 26, 2013. (CR 369).
- The plaintiffs' reply to Kountze ISD's response to the plaintiffs' motion for partial summary judgment, filed April 29, 2013. (CR 879).
- Kountze ISD's supplement to its response to the plaintiffs' motion for partial summary judgment, filed May 6, 2013. (CR 1028).

3. The school district's motion for summary judgment on its request for declaratory relief.

- Kountze ISD's motion for summary judgment on its request for declaratory relief, filed April 15, 2013. (3d SCR 31).
- The plaintiffs' response to Kountze ISD's motion for summary judgment, filed April 29, 2013. (CR 879).
- Kountze ISD's reply to the plaintiffs' response to its motion for summary judgment, filed May 3, 2013. (CR 910).

D. The trial court's ruling.

On May 8, 2013, the trial court issued its Summary Judgment Order, granting the following relief:

> On Tuesday April 30, 2013, the Court heard Kountze I.S.D.'s Plea to the Jurisdiction, the No Evidence Motion for Summary Judgment of Kountze I.S.D. and Kevin Weldon on Damages, the No Evidence Motion for Summary Judgment of

Kountze I.S.D. on Ultra Vires, Plaintiffs' Motion for Partial Summary Judgment, Defendants Kountze I.S.D.'s and Kevin Weldon's Special Exceptions to Plaintiffs' Motion for Partial Summary Judgment, Kountze I.S.D.'s Motion for Reconsideration, for Clarification and for Protective Order, Kountze I.S.D.'s Objections to Plaintiffs' Summary Judgment Evidence and Motion to Strike, and Plaintiffs' Objections and Motion for Protective Order to Defendant's Subpoenas; the responses to these motions; and the evidence presented as well as the arguments of counsel.

Based upon the pleadings and briefs of the parties, the evidence presented, and the argument of counsel, and after due consideration, IT IS ORDERED, ADJUDGED AND DECREED that the Court makes the following findings of fact and conclusions of law:

1. On October 18, 2012, the Court entered a temporary injunction enjoining Defendant from preventing the cheerleaders of Kountze Independent School District from displaying banners or run-throughs containing religious messages at sporting events. The injunction served to allow the cheerleaders to continue to display their banners at Kountze Independent School District football games for the remainder of the 2012 football season.

2. The evidence in this case confirms that religious messages expressed on run-through banners have not created, and will not create, an establishment of religion in the Kountze community.

3. The Kountze cheerleaders' banners that included religious messages and were displayed during the 2012 football season were constitutionally permissible.

4. Neither the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events. Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

> Plaintiffs' Motion for Partial Summary Judgment and Defendants' Traditional Motion for Summary Judgment of Kountze Independent School District Regarding Its Request for Declaratory Judgment are GRANTED to the extent those Motions are consistent with this order of the Court.
>
> All other relief sought by the parties and not expressly granted herein is denied, other than the issue of attorneys' fees, which is reserved for further consideration by the Court. (CR 1034-1035) (Tab 3).

The plaintiffs agreed, in form *and substance*, to the summary judgment order, as evidenced by the signature of their lead counsel. (CR 1036).

III. The school district's notice of appeal.

The school district appealed on May 28, 2013:

> NOW COMES Kountze Independent School District ("Kountze ISD"), defendant herein, and gives notice of its desire to take an accelerated appeal of the 356th Judicial District Court, Hardin County, Texas', Summary Judgment Order. The Summary Judgment Order was entered on May 8, 2013. The District Court cause number is 53526 and the style of the case is *Coti Matthews et al. v. Kountze Independent School District.*
>
> This Accelerated Appeal is taken pursuant to Texas Civil Practice & Remedies Code §51.014(a)(8) and Rule 28.1 of the Texas Rules of Appellate Procedure. See *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300 (Tex. 2011) (citing *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004)). This Accelerated Appeal is taken to the Ninth Court of Appeals at Beaumont, Texas. This notice of appeal is filed by Kountze ISD. (CR 1044).

FILED FOR RECORD

2013 MAY -8 PM 1:40

Cause No. 53526

COTI MATTHEWS, et al,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	HARDIN COUNTY, TEXAS
	§	
VS.	§	
	§	
KOUNTZE INDEPENDENT SCHOOL DISTRICT and KEVIN WELDON, in his individual and official capacity as Superintendent,	§	356TH Judicial District
	§	
Defendants.	§	
	§	

SUMMARY JUDGMENT ORDER

On Tuesday April 30, 2013, the Court heard Kountze I.S.D.'s Plea to the Jurisdiction, the No Evidence Motion for Summary Judgment of Kountze I.S.D. and Kevin Weldon on Damages, the No Evidence Motion for Summary Judgment of Kountze I.S.D. on Ultra Vires, Plaintiffs' Motion for Partial Summary Judgment, Defendants Kountze I.S.D.'s and Kevin Weldon's Special Exceptions to Plaintiffs' Motion for Partial Summary Judgment, Kountze I.S.D.'s Motion for Reconsideration, for Clarification and for Protective Order, Kountze I.S.D.'s Objections to Plaintiffs' Summary Judgment Evidence and Motion to Strike, and Plaintiffs' Objections and Motion for Protective Order to Defendant's Subpoenas; the responses to these motions; and the evidence presented as well as the arguments of counsel.

Based upon the pleadings and briefs of the parties, the evidence presented, and the argument of counsel, and after due consideration, IT IS ORDERED, ADJUDGED AND DECREED that the Court makes the following findings of fact and conclusions of law:

1. On October 18, 2012, the Court entered a temporary injunction enjoining Defendant from preventing the cheerleaders of Kountze Independent School District from displaying banners or run-throughs containing religious messages at sporting events. The injunction served to allow the cheerleaders to continue to display their banners at Kountze Independent School District football games for the remainder of the 2012 football season.

2. The evidence in this case confirms that religious messages expressed on run-through banners have not created, and will not create, an establishment of religion in the Kountze community.

3. The Kountze cheerleaders' banners that included religious messages and were displayed during the 2012 football season were constitutionally permissible.

4. Neither the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events. Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

Plaintiffs' Motion for Partial Summary Judgment and Defendants' Traditional Motion for Summary Judgment of Kountze Independent School District Regarding Its request for Declaratory Judgment are GRANTED to the extent those Motions are consistent with this order of the Court.

All other relief sought by the parties and not expressly granted herein is denied, other than the issue of attorneys' fees, which is reserved for further consideration by the Court.

Signed this 24 **day of** May **, 2013.**

Honorable Steven Thomas
Judge, 356th Judicial District

Agreed to in Substance and Form:

David W. Starnes
Counsel for the Cheerleader Plaintiffs

Thomas P. Brandt
Counsel for Kountze I.S.D.

Adam W. Aston
Counsel for the State of Texas

RESOLUTION AND ORDER NO. 3

A RESOLUTION OF THE BOARD OF TRUSTEES, KOUNTZE INDEPENDENT SCHOOL DISTRICT, ADOPTING AN ORDER CONCERNING FLEETING REFERENCES TO RELIGION DURING SCHOOL-SPONSORED EVENTS.

WHEREAS, the members of the Board of Trustees of the Kountze Independent School District ("the Board") are the duly elected representatives of the people of the Kountze Independent School District ("the KISD Community"), live in the KISD Community and have knowledge of the KISD Community.

WHEREAS, each member of the Board, upon taking office, swore or affirmed that he or she would "to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God." TEX. CONST. art. 16, § 1.

WHEREAS, the Board and each of its members individually intend, with the help of God, to fulfill their oath of office, by preserving, protecting and defending the Constitution and laws of the United States and of this State.

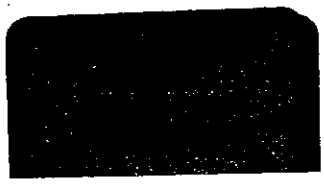
WHEREAS, under the Constitution of the United States, the whole United States is obliged to guaranty to each State a republican form of government, and all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

WHEREAS, the People of the State of Texas, in the constitutional exercise of these reserved powers, through the Constitution and laws of Texas, have established and maintained a republican government, and have vested this elected Board with the primary authority and duty to implement the state's system of public education in the KISD Community.

WHEREAS, in the exercise of this authority, in response to concerns of members of the KISD Community regarding the appearance of hostility to religion or the favoring of irreligion over religion, the Board adopted Resolution and Order No. 1, which instructed Superintendent Kevin Weldon to assist the Board in organizing an opportunity for the Board to receive evidence, both oral and written, regarding the perception of the on-going "run-through" banners controversy within the KISD Community.

WHEREAS, the Board held a hearing on February 26, 2013, to hear evidence pursuant to Resolution and Order No. 1. The Board has received evidence, both oral and written, regarding the "run-through" banners controversy. The oral and written evidence submitted to the Board in connection with the February 26, 2013, hearing is included in Appendix No. 1.

WHEREAS, the Board received additional evidence from counsel, which is included in Appendix No. 2.



WHEREAS, on behalf of themselves and the KISD Community, the Board is proud of the Kountze High School Cheerleaders ("the High School Cheerleader Squad") the Kountze Middle School Cheerleaders ("the Middle School Cheerleader Squad") (jointly, "the Cheerleader Squad") and conveys, to all past and present members of the Cheerleader Squad, the KISD Community's gratitude for their work on behalf of the school and the community.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE KOUNTZE INDEPENDENT SCHOOL DISTRICT THAT THE FOLLOWING ORDER BE ADOPTED:

ORDER

ARTICLE I PURPOSE AND INTENT

Section 1.01 Adoption of Preamble

The "whereas" clauses above constitute the preamble of this resolution. The findings contained in the preamble of this resolution and order are determined to be true and correct and are adopted as a part of this resolution and order.

Section 1.02 Purpose and Intent

It is the purpose of this resolution and order to fully comply with all of the Board's duties under federal and state law, including the Board's obligations under both the Fourteenth Amendment to the Constitution of the United States and the Texas Bill of Rights, and the Board's duty under Texas law to govern the provision of public education in the KISD Community. It is also the purpose and intent of this resolution and order to provide guidance to personnel of the Kountze Independent School District to promote the health, safety, morals and general welfare of the members of the Kountze Independent School District community and to respect the constitutional rights of all.

Section 1.03 Findings

Based on evidence known to the Board concerning the practice of utilizing school banners, and particularly "run-through" banners, in the KISD Community and based on the historical practices of the United States government and people relating to the religious messages presented in hearings and in reports made available to the Board, and based on findings and holdings in the cases of *Lee v. Weisman*, 505 US 577 (1992), *Santa Fe Independent School Dist. v. Doe*, 530 US 290 (2000), *Van Orden v. Perry*, 545 US 677 (2005), and *McCreary County v. American Civil Liberties Union of Ky.*, 545 US 844 (2005), the Board makes the following legislative findings of fact:

(a) Findings regarding the use of "run-through" banners by the Kountze Independent School District.

1. The Cheerleader Squad is an organized extracurricular activity of Kountze Middle School and Kountze High School, which are part of Kountze Independent School District.

2. The Cheerleader Squad serves a variety of purposes, including, but not limited to, teaching its student-members to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork and take pride in a quality performance through maintaining high standards.

3. For decades, one of the official activities of the High School Cheerleader Squad has been the preparation of "run-through" banners for display and use at Kountze High School varsity football games. Such "run-through" banners generally display a brief message.

4. In addition, for decades, the Cheerleader Squad has prepared other banners for display and use in connection with their official activities as the Cheerleader Squad.

5. The banners displayed and used by the Cheerleader Squad, including "run-through" banners, have generally served the purpose of encouraging athletic excellence, good sportsmanship, and school spirit.

6. For decades, the KISD Community, the Kountze Independent School District, and the Board have understood and intended that in preparing and displaying banners as part of school activities, including the "run-through" banners, the Cheerleader Squad as a whole and the individual cheerleaders on the Cheerleader Squad act as representatives and spokespersons for the KISD Community, the Kountze Independent School District, and the Kountze Middle School or Kountze High School.

7. For decades, neither the Board nor the Kountze Independent School District has micro-managed the content of the banners, but has generally entrusted the Cheerleader Squad and their supervising sponsors with discretion to decide how to best speak on behalf of the community and school. The content of the banners has never before been a source of controversy.

8. It is and has been the understanding and intention of Kountze Independent School District that Kountze Independent School District Board of Trustees Policies FNA (LEGAL) and FNA (LOCAL) do not apply to the "run-through" banners for at least the following reasons: (1) the "run-through" banners are approved in advance or otherwise supervised by school officials; (2) the "run-through" banners are subject to the supervision of, among others, the High School Cheerleader Squad sponsors, the Athletic Director, the Campus Principal and the Superintendent; and (3) preparation of the "run-through" banners has traditionally been entrusted to the High School Cheerleader Squad, an organized extracurricular activity of Kountze Independent School District.

9. For decades, it has been common knowledge among members of the KISD Community that many of its members, including many student athletes and fans, profess some religious belief, that many such persons identify themselves as Christians.

10. The banner messages, whether religiously themed or otherwise, have primarily served the purpose of encouraging athletic excellence, good sportsmanship, and school spirit.

11. Some or all of the "run-through" banners that were prepared and used during the 2012-2013 school year contained religiously-themed messages, including quotations from the Bible and references to Jesus Christ. However, the vast majority, if not all, of the "run-through" banners in the past have not included any religiously-themed messages.

12. The banner messages have not functioned as prayers addressed to God, but as messages of encouragement addressed to athletes and perhaps other members of the KISD Community.

13. The messages on the "run-through" banners, including religiously-themed messages, have not been intended to proselytize or convey any message in any way hostile to any member of the KISD Community.

14. The messages on the "run-through" banners, including religiously-themed messages, have never been part of a prayer or other religious exercise and have not served to solemnize the event nor otherwise to induce reverence.

15. Spectators at Kountze High School football games are not required or expected to stand, bow their heads, or give any sign of consent or endorsement as to the message contained on the "run-through" banners.

16. The messages on the "run-through" banners, whether religiously-themed or otherwise, are displayed for a short period of time (generally no more than a couple of minutes), until they are destroyed by the student athletes and subsequently discarded.

17. Before, during, and after the brief display of the "run-through" banners, many non-religious messages of encouragement are communicated on behalf of the KISD Community and the Kountze Independent School District, whether by display, oral statements amplified by microphone, or otherwise.

18. Before September 17, 2012, there is no record of the Board receiving directly or indirectly any objection, by anyone, to the religious nature of any message on the run-through banners.

19. On September 17, 2012, Kevin Weldon ("Mr. Weldon"), Superintendent of the Kountze Independent School District, received a letter from the Freedom from Religion Foundation ("the FFRF letter").

20. The FFRF letter states that inclusion of religiously-themed messages on the "run-through" banners violates the Establishment Clause of the First Amendment to the United States Constitution ("the Establishment Clause"), as that clause has been interpreted by the Supreme Court of the United States ("the Supreme Court").

21. The FFRF letter does not specifically identify any person who has complained about the "run-through" banners, or whether that person has a child or other relative attending KISD schools.

22. Neither Mr. Weldon, Mr. Reese Briggs, the Interim Superintendent, nor the Board has received any complaints about the content of the "run-through" banners from any cheerleader, football player or other individual whose responsibilities require them to attend or participate in Kountze High School football games.

23. After receiving the FFRF letter, Mr. Weldon sought legal advice from two separate lawyers, both of whom informed Mr. Weldon that the "run-through" banners appeared to violate the Establishment Clause, as interpreted by the Supreme Court in a decision styled *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

24. Based on the legal advice he received, on September 18, 2012, Mr. Weldon notified the campus principals that "run-through" banners could no longer include religiously themed messages and asked the campus principals to convey this message to the students at their respective campuses.

25. Because of the immediacy of the situation, Mr. Weldon was forced to make a decision before he had the opportunity to consult with the Board, which by law must post a 72-hour notice before meeting.

26. On September 20, 2012, some members of the Cheerleader Squad and their parents filed a lawsuit against the Kountze Independent School District and Mr. Weldon, styled *Coti Matthews et al. v. Kountze Independent School District et al.*, Cause No. 53526 (356th Judicial District, Hardin County, Texas) ("the Lawsuit").

27. On September 20, 2012, Judge Thomas entered a temporary restraining order in the Lawsuit. Judge Thomas subsequently entered a temporary injunction order on October 18, 2012. Kountze Independent School District and Mr. Weldon obeyed and have continued to obey the temporary restraining order and the temporary injunction order issued by Judge Thomas.

28. As a result of the issuance of the temporary restraining order and the subsequent temporary injunction order, the Board and Kountze Independent School District personnel have not had their ordinary authority over the contents of the run-through banners.

29. The Board is not aware of any messages displayed on the run-through banners since the issuance of the temporary restraining order of which it disapproves.

30. Other than the "run-through" banners, the Board is not aware of any school banners displayed or used by the Cheerleader Squad prior to September 20, 2012, that contained any religious messages.

31. Based on the information and evidence available, the Board believes that individuals in the KISD Community perceive the decision to prevent the display of the religiously themed run-through banners as conveying hostility toward religion and a preference for those who believe in no religion over those who do believe.

32. The Board is disappointed that the attorneys representing the cheerleaders involved in the Lawsuit advocated immediate recourse to the district court rather than bringing their concerns to the Board, as provided for in State Law and KISD Board policy. On the date that the attorneys filed suit against KISD and sought a temporary restraining order, there was more than a week before the next Kountze High School varsity football game. Consequently, while it would have required quick action, there was still the possibility of the Board meeting, in compliance with the Texas Open Meetings Act, prior to the next varsity football game.

33. The actions of the attorneys in seeking immediate judicial relief prevented the Board from having an opportunity to consider the issue prior to the issuance of the temporary restraining order. In fact, the attorneys entirely failed to bring their concerns before the Board until February 26, 2013, at the hearing called for by the Board, on its own initiative, to investigate the questions raised by the FFRF Letter, the Lawsuit and the surrounding KISD Community concerns.

34. Despite the failure of the attorneys representing some of the cheerleaders to bring their concerns to the Board, the Board took prompt action to investigate and resolve the questions raised by the FFRF Letter and the Lawsuit.

35. The Board rejects the claims made against KISD in the Lawsuit. Based on how KISD and its extracurricular activities have operated for decades, the policies duly enacted by the Board, and the relevant constitutional and statutory provisions and judicial decisions, the school banners, including "run-through" banners, displayed by the Cheerleader Squad represent KISD and are not intended to represent the expression or beliefs of individual students or cheerleaders. In other words, the "run-through" banners are the speech of the school, not private speech.

36. The Board, and those school officials designated by it, are authorized by longstanding custom and practice, as well as by its role as a representative of the KISD Community to regulate the content of school banners.

37. For instance, the Board has been made aware of recent news reports indicating that students at a public school in Louisiana displayed, at a basketball championship game against a private school named Parkview Baptist, banners that stated, "Jesus [heart]'s you ... unless you attend Parkview Baptist." The Board agrees with the position taken by the High School Cheerleader Squad Sponsors in their depositions in the Lawsuit that such a banner would constitute poor sportsmanship and should not be permitted to be displayed by the Kountze ISD Cheerleader Squad, regardless of its arguably religious content.

38. The Board is proud of the opportunity it has been able to provide to many of its students over the decades to participate in the Cheerleader Squad. As part of that participation, the cheerleaders have learned important lessons about teamwork, leadership and support for the KISD Community.

(b) Additional findings in light of historical practice and precedent outside the KISD Community.

1. It has been the unbroken and constant tradition in the United States from Colonial times to the present for both the People and the government to recognize the existence of God, His authorship of rights, our dependence on Him, and the duty to thank Him for his beneficence. Please see the Appendix No. 3 for a few of the numerous historical documents evidencing what is written herein.

2. Moreover, the Board agrees with the Supreme Court of the United States that the Establishment Clause should not be interpreted so as to prefer "those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). As the Supreme Court explained, there is "no constitutional requirement which makes it necessary for government to be hostile to religion." 343 U.S. at 313. Nor must government "throw its weight against efforts to widen the effective scope of religious influence." *Id.*

3. It is the experience of the Board and the KISD Community and of the United States more broadly that "we are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313, repeated with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963).

4. Similarly, the Constitution of the State of Texas begins by invoking "the blessings of Almighty God" and requires those holding public office to acknowledge the existence of a Supreme Being. TEX. CONST. Preamble and art. 1, § 4.

5. Based on the evidence and historical traditions, the Board concludes that religion has been and continues to be a legitimate, important, and positive part of the KISD Community.

6. In light of the traditions of this country, of this state and of this community, the Board concludes that the Establishment Clause of the First Amendment to the United States Constitution should not be interpreted so as to require KISD to eliminate all fleeting expressions of religious belief at school-sponsored events merely because they occur on school banners.

7. "Run-through" banners, like other school banners displayed by the Cheerleader Squad as part of their official activities, are the speech of KISD and are subject to the control and oversight of various school officials including, but not limited to, the Superintendent, the campus principals, the athletic director, and the sponsors of the Cheerleader Squad.

8. The religiously-themed messages on the "run-through" banners, like countless other messages on the "run-through" or other school banners, are fleeting expressions of community sentiment.

9. The Board does not believe that, in the context of the KISD Community, the use of the religiously-themed messages on the "run-through" banners created or is likely to create an establishment of religion.

10. The Board believes that the Establishment Clause does not require it to exclude such fleeting expressions merely because some of them express religious sentiments that are widely held within the KISD Community.

11. Despite the Board's belief that the "run-through" banners do not violate the Establishment Clause, Mr. Weldon nevertheless received the FFRF Letter from a Freedom from Religion Foundation staff attorney. In addition, the Freedom from Religion Foundation has filed an amicus brief in the Lawsuit asserting that permitting religiously-themed "run-through" banners violates the Establishment Clause.

12. In order to make clear its legal obligations, the Board has requested that Judge Thomas issue a ruling declaring whether or not the Establishment Clause requires KISD to prohibit the inclusion of religiously-themed messages on the "run-through" banners.

13. The Board anticipates receiving Judge Thomas' decision prior to the beginning of the 2013-2014 school year and prior to the beginning of any Cheerleader Squad activities for the 2013-2014 school year. All Cheerleader Squad activities for the 2012-2013 school year have already finished and there are no more activities until the start of the activities for the 2013-2014 school year.

ARTICLE II DEFINITIONS

Section 2.01 **Definitions**

"School banner" means, for purposes of this Resolution, a sign or banner displayed by the Cheerleader Squad, either the Middle School Cheerleader Squad or the High School Cheerleader Squad, as part of their school-sponsored activities as the Cheerleader Squad.

"Run-through banner" means a sign or banner displayed in a stadium or auditorium during or in conjunction with a sports game through which a Kountze Independent School District sports team runs through. "Run-through banners" are a type of "school banner."

"Cheerleader Squad" means the group of students who have been selected to serve as cheerleaders at Kountze Independent School District sporting events.

ARTICLE III AMENDMENT TO POLICY FNA (LOCAL)

Section 3.01 **Amendment**

Kountze Independent School District Policy FNA (LOCAL) is amended to include the following declaratory and clarificatory paragraph at the conclusion of the section titled "STUDENT SPEAKERS AT NONGRADUATION EVENTS":

> Run-through banners are not a limited public forum for student speakers at Kountze Independent School District sporting events. Run-through banners are not an opportunity for students "to publicly speak" as that phrase is used in this policy.

An amended and restated version of Policy FNA (LOCAL) is attached hereto and marked as Exhibit No. 1.

ARTICLE IV MISCELLANEOUS

Section 4.01 **Guidance to School Personnel Regarding Supervision of the Cheerleader Squad**

The Middle School Cheerleader Squad and the High School Cheerleader Squad are extracurricular activities of KISD pursuant to Board Policy FM(LEGAL). The Cheerleader Squad is sponsored by KISD and sponsors are employed and paid by KISD for the specific purpose of overseeing, leading, organizing and, as necessary, disciplining students involved in the Cheerleader Squad. In fact, Board policy, for instance, FNC(LOCAL), FNCA(LOCAL), and FO(LOCAL), specifically permits the sponsors to develop higher standards of conduct than normally apply to KISD students.

The Middle School Cheerleader Squad and the High School Cheerleader Squad are not noncurriculum-related groups under Board Policy FNAB(LOCAL). The sponsors of the

Cheerleader Squad are not "employee monitors" as that term is used in Board Policy FNAB(LOCAL).

Those individuals responsible for supervising the Cheerleader Squad, specifically the Cheerleader Squad sponsors, are expected to approve in advance or otherwise supervise all banners prepared by the Cheerleader Squad for display as part of the normal activities and duties of the Cheerleader Squad. While the day-to-day responsibility to approve or otherwise supervise such banners is entrusted primarily to the Cheerleader Squad sponsors, other appropriate school personnel retain the right to regulate the display and content of such banners.

For purpose of this section, "other appropriate school personnel" means the superintendent, the campus principals, the athletic director, the coach of the sports team playing, and such other school personnel designated by one of these identified school personnel.

Section 4.02 Fleeting Expressions of Community Sentiment

Based on the evidence, including oral and written testimony submitted to the Board, the Board concludes that school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious.

The Board and school personnel retain the right to restrict the content of school banners, including run-through banners. The Board notes that such restrictions generally relate to the overall purpose of run-through banners as part of school sporting events.

Section 4.03 Distribution of this Order and Resolution

The Superintendent or his designee is directed to distribute a copy of this resolution and order to all campus principals and to instruct all campus principals to distribute it to the athletic director, the coaches of the various sports teams, and the Cheerleader Squad sponsors.

IT IS SO ORDERED.

ENACTED and ORDERED by the Board of Trustees of the Kountze Independent School District on the 27th day of April, 2015 at a duly constituted specially called meeting of the Board of Trustees.

Wayland Winstead, President
Board of Trustees
Kountze Independent School District

ATTEST:

Logan Carter, Secretary

APPROVED AS TO FORM:

Father Hunt

1047

Board of Trustees
Kountze Independent School District

General Counsel
Kountze Independent School District

STUDENT EXPRESSION OF RELIGIOUS VIEWPOINTS

The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

STUDENT SPEAKERS AT NONGRADUATION EVENTS

The District hereby creates a limited public forum for student speakers at all school events at which a student is to publicly speak. For each speaker, the District shall set a maximum time limit reasonable and appropriate to the occasion.

For purposes of this policy, a "school event" is a school-sponsored event or activity that does not constitute part of the required instruction for a segment of the school's curriculum, regardless of whether the event takes place during or after the school day.

For purposes of this policy, "to publicly speak" means to address an audience at a school event using the student's own words. A student is not using his or her own words when the student is reading or performing from an approved script, is delivering a message that has been approved in advance or otherwise supervised by school officials, or is making brief introductions or announcements.

Run-through banners are not a limited public forum for student speakers at Kountze Independent School District sporting events. Run-through banners are not an opportunity for students "to publicly speak" as that phrase is used in this policy.

INTRODUCTORY SPEAKERS

Student speakers shall be given a limited public forum to introduce:

1. High school and middle school football games; and
2. High school and middle school banquets.

The forum shall be limited in the manner provided by this section on nongraduation events.

ELIGIBILITY AND SELECTION

Students are eligible to use the limited public forum if they:

1. Are in the highest two grade levels of the school;
2. Volunteer; and
3. Are not in a disciplinary placement at the time of the speaking event.

Eligible students who wish to volunteer shall submit their names to the campus principal during the first full week of instruction each semester. Students are not eligible to volunteer if they are in a disciplinary placement during any part of the first full week of instruc-

tion. If there are no student volunteers, the District shall seek volunteers again at the beginning of the next semester.

The names of the students who volunteer to speak shall be randomly drawn until all names have been selected; the names shall be listed in the order drawn.

ASSIGNMENT OF INTRODUCTORY SPEAKERS

Each selected student shall be matched chronologically to the single event for which the student shall give the introduction. The list of student speakers shall be chronologically repeated as needed, in the same order. If no students volunteer or if the selected speaker declines or becomes ineligible, no student introduction will be made at the event.

The District shall repeat the selection process at the beginning of each semester.

CONTENT OF STUDENT INTRODUCTIONS

The subject of the student introductions shall relate to the purpose of introducing the designated event. The student must stay on the subject. The student may not engage in speech that:

- Is obscene, vulgar, offensively lewd, or indecent;
- Creates reasonable cause to believe that the speech would result in material and substantial interference with school activities or the rights of others;
- Promotes illegal drug use;
- Violates the intellectual property rights, privacy rights, or other rights of another person;
- Contains defamatory statements about public figures or others; or
- Advocates imminent lawless action and is likely to incite or produce such action.

The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

DISCLAIMER

For as long as there is a need to dispel confusion over the fact that the District does not sponsor the student's speech, at each event in which a student shall deliver an introduction, a disclaimer shall be stated in written or oral form, or both, such as, "The student giving the introduction for this event is a volunteering student selected on

neutral criteria to introduce the event. The content of the introduction is the private expression of the student and does not reflect the endorsement, sponsorship, position, or expression of the District."

OTHER STUDENT SPEAKERS

Certain students who have attained special positions of honor in the school have traditionally addressed school audiences from time to time as a tangential component of their achieved positions of honor, such as the captains of various sports teams, student council officers, class officers, homecoming kings and queens, prom kings and queens, and the like, and have attained their positions based on neutral criteria. Nothing in this policy eliminates the continuation of the practice of having these students, regardless of grade level, address school audiences in the normal course of their respective positions. The District shall create a limited public forum for the speakers and shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against a student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

STUDENT SPEAKERS AT GRADUATION CEREMONIES

The District hereby creates a limited public forum consisting of an opportunity for a student to speak to begin graduation ceremonies and another student to speak to end graduation ceremonies. For each speaker, the District shall set a maximum time limit reasonable and appropriate to the occasion.

OPENING AND CLOSING REMARKS

The forum shall be limited in the manner provided by this section on student speakers at graduation.

ELIGIBILITY

Only students who are graduating and who hold one of the following positions of honor based on neutral criteria shall be eligible to use the limited public forum: the top four academically ranked students. A student who shall otherwise have a speaking role in the graduation ceremonies is ineligible to give the opening and closing remarks. Students who are eligible shall be notified and given an opportunity to volunteer. Students are not eligible to volunteer if they were in a disciplinary placement during any part of the spring semester.

The names of the eligible students who volunteer shall be randomly drawn. The student whose name is drawn first shall give the opening and the student whose name is drawn second shall give the closing.

CONTENT OF OPENING AND CLOSING REMARKS

The topic of the opening and closing remarks shall be related to the purpose of the graduation ceremony and to the purpose of marking the opening and closing of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event.

OTHER STUDENT SPEAKERS

In addition to the students giving the opening and closing remarks, the valedictorian and salutatorian may have speaking roles at graduation ceremonies. For each speaker, the District shall set a maximum time limit reasonable and appropriate to the occasion and to the position held by the speaker. For this purpose, the District creates a limited public forum for these students to deliver the addresses. The subject of the addresses shall be related to the purpose of the graduation ceremony, marking and honoring the occasion, honoring the participants and those in attendance, and the student's perspective on purpose, achievement, life, school, graduation, and looking forward to the future.

The student shall stay on the subject, and the student shall not engage in speech that:

- Is obscene, vulgar, offensively lewd, or indecent;
- Creates reasonable cause to believe that the speech would result in material and substantial interference with school activities or the rights of others;
- Promotes illegal drug use;
- Violates the intellectual property rights, privacy rights, or other rights of another person;
- Contains defamatory statements about public figures or others; or
- Advocates imminent lawless action and is likely to incite or produce such action.

The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

DISCLAIMER

A written disclaimer shall be printed in the graduation program that states, "The students who shall be speaking at the graduation ceremony were selected based on neutral criteria to deliver messages

of the students' own choices. The content of each student speaker's message is the private expression of the individual student and does not reflect the endorsement, sponsorship, position, or expression of the District."

RELIGIOUS EXPRESSION IN CLASS ASSIGNMENTS

A student may express his or her beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of the student's submission. Homework and classroom work shall be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. A student shall not be penalized or rewarded because of religious content. If a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards, including literary quality, and not penalized or rewarded because of its religious content.

FREEDOM TO ORGANIZE RELIGIOUS GROUPS AND ACTIVITIES

Students may organize prayer groups, religious clubs, "see you at the pole" gatherings, and other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups. [See FNAB] Religious groups shall be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination based on the religious content of the group's expression. If student groups that meet for nonreligious activities are permitted to advertise or announce the groups' meetings, for example, by advertising in a student newspaper, putting up posters, making announcements on a student activities bulletin board or public address system, or handing out leaflets, school authorities shall not discriminate against groups that meet for prayer or other religious speech. School authorities may disclaim sponsorship of noncurricular groups and events, provided the disclaimer is administered in a manner that does not favor or disfavor groups that meet to engage in prayer or other religious speech.

STUDENT RIGHTS AND RESPONSIBILITIES
STUDENT EXPRESSION

STUDENT EXPRESSION OF RELIGIOUS VIEWPOINTS

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Eligible students who wish to volunteer shall submit their names to the campus principal during the first full week of instruction each semester. Students are not eligible to volunteer if they are in a disciplinary placement during any part of the first full week of instruction. If there are no student volunteers, the District shall seek volunteers again at the beginning of the next semester.

[redacted]

Defendants
EXHIBIT NO. 18
3-5-13 cj

The names of the students who volunteer to speak shall be randomly drawn until all names have been selected; the names shall be listed in the order drawn.

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For as long as there is a need to dispel confusion over the fact that the District does not sponsor the student's speech, at each event in which a student shall deliver an introduction, a disclaimer shall be stated in written or oral form, or both, such as, "The student giving the introduction for this event is a volunteering student selected on neutral criteria to introduce the event. The content of the introduction is the private expression of the student and does not reflect the endorsement, sponsorship, position, or expression of the District."

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Certain students who have attained special positions of honor in the school have traditionally addressed school audiences from time to time as a tangential component of their achieved positions of honor, such as the captains of various sports teams, student council officers, class officers, homecoming kings and queens, prom kings and queens, and the like, and have attained their positions based on neutral criteria. Nothing in this policy eliminates the continuation of the practice of having these students, regardless of grade level, address school audiences in the normal course of their respective positions. The District shall create a limited public forum for the speakers and shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against a student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

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The student shall stay on the subject, and the student shall not engage in speech that:

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A written disclaimer shall be printed in the graduation program that states, "The students who shall be speaking at the graduation ceremony were selected based on neutral criteria to deliver messages of the students' own choices. The content of each student speaker's message is the private expression of the individual student and does not reflect the endorsement, sponsorship, position, or expression of the District."

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Students may organize prayer groups, religious clubs, "see you at the pole" gatherings, and other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups. [See FNAB] Religious groups shall be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination based on the religious content of the group's expression. If student groups that meet for nonreligious activities are permitted to advertise or announce the groups' meetings, for example, by advertising in a student newspaper, putting up posters, making announcements on a student activities bulletin board or public address system, or handing out leaflets, school authorities shall not discriminate against groups that meet for prayer or other religious speech. School authorities may disclaim sponsorship of noncurricular groups and events, provided the disclaimer is administered in a manner that does not favor or disfavor groups that meet to engage in prayer or other religious speech.

Tryout PACKET

Constitution

CONSTITUTION OF THE KOUNTZE HIGH SCHOOL CHEERLEADERS AND MANAGERS

Name

This Constitution has been written and adopted for the Kountze High School Cheerleaders. The team and its Constitution are governed by Kountze High School and the members of the KHS Cheerleaders.

Purpose

The purpose of the KHS Cheerleaders is to:

1. Create school spirit, pride, and loyalty.
2. Promote interest in school activities and perform at school games.
3. Develop responsibility, teach self-respect, encourage honest effort, strive for perfection and develop character.
4. Teach teamwork and pride in a quality performance through maintaining high standards.

Eligibility

A. Expectations for Entrance

1. Be a KHS student.
2. Once elected, have a maintained average of 70 in every subject at the end of each eligible grading period.
3. Have a pleasing personality, a spirit of cooperation, and the ability to get along with teachers and other students.
4. Have and keep a reputation of high moral character.
5. Submit a completed tryout package BEFORE tryouts take place.
   a. The forms must be read and signed by the candidate.
   b. The forms must be read and signed by the parent/guardian.
   c. In order for a student to become a member of the cheerleading squad, he/she must be physically and emotionally capable of practicing, cheering, stunting, tumbling, and jumping extensively. Each candidate must have a current physical form prior to tryouts and MUST have a doctor's release for recent injuries or illness before being allowed to participate.
6. Attend summer camp.
7. Be able and willing to attend all mandatory practices.
8. Be able to give freely of his/her time for any cheerleading activity throughout the year, before, during, or after school, and in the summer when scheduled.
9. He/She and his/her parents must be fully aware of the expenses of being a member of the cheerleading squad. They must be willing to meet all financial obligations. Money paid is not refundable; be prepared to pay for the uniform and camp deposits the night of tryouts.
10. Parents must be willing to assist the student in obeying all the rules and regulations of the school and organization at all times.
11. The students and parents MUST be willing to participate fully in all fundraising activities for the whole group. Participation is vital and acts to lower the costs to parents for certain activities.

Defendants
EXHIBIT NO. 1
2-20-13 CJ

Tryout PACKET

Constitution (Continued)

Parental Permission

A. Parents must give their child permission to participate in all activities of the organization before a student is officially accepted as a member. Permission forms are attached and must be filed with the coach/sponsor.

1. In or out of town athletic games.
2. In or out of town competitions, contests, etc.
3. Meetings, poster parties, etc.
4. Practices before and/or after school and summer practices.
5. Summer camp.
6. Parades.
7. Special clinics during the year.
8. Community service projects.

B. The parents must be willing to purchase all parts for the necessary uniforms, camp clothes, wind suits, summer camp fees, and to provide money for other cost involved in being a member.

C. Parents must be willing to participate in meetings and fundraising efforts that are intended to benefit the squad as a whole. This will include them working at least one volleyball game in the concession stand or one football game selling certain fundraisers (programs, spirit items). Parents must recognize that their attitudes and conduct are also a direct reflection upon the squad; therefore, actions will be taken when deemed necessary by the coach/sponsor and/or principal.

Grades

All Cheerleaders and managers are expected to follow UIL eligibility requirements. If a cheerleader does not meet eligibility requirements, then he/she is on probation until the next grading report. If on probation for grades the cheerleader is not allowed to participate in any cheerleading performance including but not limited to: pep rallies, games, competition, parades, etc.

If they remain ineligible because of grades for two consecutive grading periods they will be dismissed from the squad at the discretion of the coach/sponsor and/or principal.

Tryout PACKET

Constitution (Continued)

12. Students must be willing and able to participate in a training program prior to trying out in front of judges. Any absence must be a medical emergency with a doctor's note. No sport practice excuse will be accepted.
13. Be in total compliance with school policies. If a student was dropped or dismissed from another club or activity for immoral actions or failure to abide by the student code of conduct, he/she may not be able to try out for cheerleader.
14. MAY NOT have habitual types of disciplinary action; referrals, ISS, SAC, truancy, or any other type of punishments.
15. Have good teacher recommendations.

A cheerleader's behavior in any activity must NEVER reflect adversely on the squad or the school. This may result in the loss of membership as a cheerleader.

B. Selection Process

1. All students will be taught a dance and an individual cheer. They will also be expected to do a jump series consisting of a front hurdler, side hurdler, and toe touch. Additionally they will be required to complete a tumble pass and create their own brief entrance chant.
2. Each cheerleader will be selected by outside judges.
3. Returning cheerleaders are required to tryout.
4. The KHS cheerleading squad will be a mixture of 9th through 12th graders, with varsity chosen from the top scores and junior varsity will be selected from the remaining applicants.

Whether or not the student is accepted may depend on the following:

1. Attitude and enthusiasm
2. Showmanship and precision
3. Voice projection
4. Smile
5. Overall spirit
6. Coordination and motion
7. Rhythm and tempo
8. Student conduct
9. Jump and tumbling technique
10. Cooperation
11. Attendance
12. Punctuality
13. Teacher recommendations

C. Transfer Students

A student wishing to tryout for cheerleader MUST be enrolled in Kountze ISD during the training and selection process.

Tryout PACKET

Constitution (Continued)

Managers

A. Selection Process

1. Manager applicants may complete a questionnaire and possibly an oral interview with the coach/sponsor.
2. Confidential teacher evaluations will be filled in and signed by each candidate's teachers.
3. Coach/sponsor will choose the managers aided by teacher evaluation forms and interviews.

B. Duties

1. Assist the coach/sponsor and head cheerleaders in any duties, errands, or requests.
2. Attend all practices and performances.
3. In charge of accessories and other assigned duties.
4. In charge of getting out and putting away music (CD's, players, tapes, cords, etc.)
5. Help with posters and run-through signs.
6. Keep up of the cheer practice and storage rooms and equipment.
7. Follow all rules and regulations of the constitution.
8. Managers may be dismissed at any time by the discretion of the coach/sponsor for not fulfilling duties and responsibilities.
9. Assist coach/sponsor in checking role.
10. Buy and wear uniforms agreed upon by sponsor.

Performance Requirements

All members are required to attend games in uniform whether they perform or not. You will still be representing the team and KHS. Students who are ineligible to participate due to failing grades or on probation for excessive demerits will not be allowed to attend games in uniform or be with the squad on the sidelines.

In the event we take school provided transportation all members must follow district policy regarding team transportation. If the member wishes to ride home from the event with a parent, the parent must sign the student out with the coach/sponsor.

After School Practice

Cheerleaders are required to attend cheer practice when scheduled. If he/she is in another UIL activity the sponsor and the coach will be given due notice. It is the responsibility of the cheerleader to provide the coach with a listing of all scheduled practices. It is the responsibility of the sponsor and coach to make appropriate arrangements when conflicts arise. Cheerleaders are required to attend at least one practice a week or this will be considered an unexcused absence. Work is not an excuse for missed practice or performances. Missing keeps the squad from participating as a team. Do not make any appointments during this time. This could result in not being allowed to perform that week. Missing practice time to serve after school detention will result in being benched from performances for a week.

Tryout PACKET

Constitution (Continued)

Attendance

A. Attendance is required for all performances and meetings. This includes all games, practices, clinics, competitions, camps, selling programs, fundraisers, parades, decorating school, hanging signs, and any other activity assigned by the coach/sponsor. No activities will be scheduled without prior approval by the coach/sponsor. Absolutely no practices will be held without a coach/sponsor present.
B. Members are required to contact the coach/sponsor before being absent from any performance or practice. Failure to do so will result in an unexcused absence and demerits regardless of the reason for the absence. If you are absent from school, the coach/sponsor must be notified. If you are more than 15 minutes late to a performance you cannot cheer at that game and must sit by the coach/sponsor and help him/her unless prior approval or arrangements were made.
C. When a member is absent, it is his/her duty to find out what was missed and be prepared the following day. Failure to be prepared may result in demerits or a change in the routine. It would be wise to call more that one person to find out the next day's requirements. Cheerleaders may receive probation for violations of the attendance policy.

If you are too ill to cheer, you are too ill to attend games, pep rallies, etc. If you are hurt and cannot cheer, you will sit with the coach/sponsor and help him/her. A doctor's note is required if you are unable to practice.

Excuses

A. Any absence from cheerleading activities is unexcused except fo the certain events listed below:
   1. Personal illness or accident (requires a doctor's note).
   2. Funeral or death in the family.
   3. Special circumstances with permission of coach/sponsor.
B. Written excuses from doctors must be turned in the day a member returns following an absence. If the excuse is not received, the absence will be unexcused.
C. If the absence from a practice is unexcused, the student will receive 3 demerits. One unexcused absence from a performance will result in automatic probation. This is suspension given at the sponsor's discretion from all cheerleading activities for a period no greater than two weeks during football or basketball season. If it occurs when there are no performances, the coach/sponsor will determine the penalty. Those on probation will still dress out and sit with the coach/sponsor, unless unable to participate due to failing grades.
D. If unable to perform in a practice or performance a doctor's note is required. If a cheerleader is injured he/she must have a written note from a doctor to return to cheer activities.

All cheerleaders are expected to cheer at all designated games (this may include volleyball, football, basketball, etc.) If they are playing in another UIL game, they must arrange for transportation to the cheer performance when they are finished, if time permits. If they do not attend and cheer at the scheduled performance they will receive 8 demerits for a missed performance. Other UIL practices are not considered priority to a cheer performance. The cheerleaders will have a schedule of the games required.

Tryout PACKET

Constitution (Continued)

Responsibilities of Cheerleaders/Managers
Character/Individual Responsibilities

Members of the cheerleading squad are expected to have and continue to display the following characteristics. Members who choose not to display these characteristics will be subject to probation or dismissal at the discretion of the coach/sponsor and/or principal.

1. Team members should be leaders within the school and set a good example at all times.
2. Attend places and activities which are of reputable character.
3. Team members should be above reproach maintaining good personal appearance at all times and habits that cannot be criticized.
   —Smoking, drinking, and/or drug use are grounds for dismissal by the sponsor.
4. Must show good sportsmanship and defer negative reactions of others.
5. NO public display of affection.
6. Positive representation of each squad member and the squad is expected at all times. Frowning, pouting, non-participation, and other problems of a like nature will result in benching. The second instance will result in grounds for dismissal from the squad.
7. A member must be courteous and friendly to all other team members as well as the student body.
8. A member must be courteous and friendly to all other teams and visitors.
9. A member must be respectful to the Advisor and be a credit to the school.
10. Must meet UIL eligibility requirements.

Demerit System

A. Description

Demerits are the means by which the coach/sponsor determines which members are not holding their obligations to the squad. Demerits affect their participation on the team.

B. Examples of Demerits

The following is an outline of the demerit schedule but the coach/sponsor can give demerits for other circumstances not mentioned below.

1. One (1) Demerit
   a. Gum during practice or performance
   b. Tardiness to any team activity or practice
   c. Jewelry during practice or performance
   d. Forgetting props or accessories
   e. Physical contact with boys/girls during practice or performance or any time while in uniform or participating in a cheer activity.
   f. Failure to respect or cooperate with the head cheerleader or other members of the squad
   g. Leaving room or bus disorderly and/or not putting equipment or supplies away properly
   h. Talking while head cheerleader or coach/sponsor is giving directions or speaking
   i. Not cheering during performances
   j. Leaving practice or performance without permission.
   k. Failure to meet deadlines
   l. Not wearing appropriate and assigned uniform

etc.)

g. Unexcused missed practice. Student cannot perform that week but must dress out and sit with coach/sponsor.

3. Six (6) Demerits (Probation):
   a. Unexcused missed performance
4. Twelve (12) Demerits (Dismissal):
   a. Assigned to AEP or suspended from school for any reason.
   b. Smoking, drinking, or drug use

C. Examples of Merits

Merits can be earned when assigned or approved by coach/sponsor. Examples: running, extra conditioning, posters, flyers, extra work, community service (not being performed for other school activities). **All issues listed in red above cannot be exchanged through the merit system.**

Probation and Dismissal

A. Probation and Dismissal

Accumulation of six demerits will result in probation; accumulation of twelve demerits will result in dismissal. Some demerits cannot be worked off at coach/sponsor discretion.

B. Condition of Probation

1. When a member is placed on probation the coach will contact him/her.
2. If their behavior does not improve within the time specified by the coach/sponsor the member will be dismissed form the squad.
3. Any head cheerleader placed on probation will automatically relinquish his/her office and rejoin the other members unless the coach/sponsor deems this detrimental to the team. The position may be filled and the coach/sponsor's discretion.
4. A member who is placed on probation will be penalized by not performing at performances set by the coach/sponsor. The member will still dress out and sit with the coach/sponsor unless not participating due to grades. If the probation occurs during a time when no performances occur, the coach/sponsor will determine the penalty.

C. Conditions of Dismissal

1. Automatic dismissal includes suspension from school or being assigned AEP.
2. When a member is dismissed a letter will be sent home to the parents explaining the situation.
3. If a member voluntarily quits he/she will not be eligible to tryout again for one full year.

Uniforms

Regulation for Uniforms

1. Uniforms are purchased by the cheerleader and are the sole responsibility of the cheerleader.
2. Uniforms are to be clean, in good condition, and fit properly before each performance or the cheerleader will be subject to not performing and receiving demerits.
3. No part of the uniform or camp clothes will be worn except when instructed by the coach/sponsor.
4. No jewelry at any time during practices or performances.
5. Coach/sponsor will decide on hairstyle and hair accessory for each performance.
6. Appropriate undergarments must be worn and UNSEEN with uniform. Student may be forced to forfeit performance and suffer appropriate disciplinary action.
7. No body piercing or tattoos may be visible during practice, camp, or performance in accordance with school dress code. One's appearance must be neat and well maintained.
8. Failure to wear any or all of the appropriate uniform will result in nonparticipation for that event, and the cheerleader will receive demerits for such behavior as reflected in the demerit system.
9. No squad member will be allowed to perform with the rest of the squad unless properly attired and equipped in a clean uniform.
10. Proper attire does not include chewing gum. NO GUM will be allowed or tolerated during practice or any performance.

Veto Clause

Since the coach/sponsor is responsible to the principal and the parents for the welfare of this organization, it is expressly understood that all student powers herein set forth are delegated by the coach/sponsor and may be revoked at any time.

Interpretation

The interpretation of this constitution is the sole right of the coach and the principals. They have the right to add or change at any time the things that they feel must be changed for the benefit of the organization. This constitution is meant to be a basic operation instrument and is not intended to cover every operation policy for the year.

Addendum to KHS Cheerleader By-Laws

School Discipline

- Gossip and/or verbal bullying will not be tolerated from any member of the cheerleading squad. If a problem occurs, the sponsor and/or principal will take action
- Squad members that represent themselves, or the squad in an unfavorable, questionable, or illegal manner through electronic media (i.e. websites, personal home pages, social media, blogs, text messages, chat rooms or similar websites/files accessible through a server or internet) or using electronic communication devices in such a way as to bring discredit, dishonor, or disgrace on their squad or members of any other school organization including themselves (i.e. camera phones, digital photos, electronic descriptions) will be subject to the disciplinary actions determined by appropriate school officials and/or sponsors/directors/coaches, which may include dismissal from the squad. Any action can/will be taken by the school in addition to that from the squad if outside activity occurs and is seen as a potential problem for the school.

Chet Deaver, Assistant Principal, KHS

Bryan Williams, Principal, KHS

Tonya Moffett, KHS Co-Cheer Sponsor

Beth Richardson, KHS Co-Cheer Sponsor

Cheerleader (Printed Name) _____

Parent/Guardian Name _____

CHEERLEADER
RULES AND REGULATIONS

PERFORMANCES AND PRACTICES

1. NO PERFORMANCE OR PRACTICE WITHOUT SPONSOR OR DESIGNEE.
2. TRANSPORTATION WILL BE PROVIDED BY THE SCHOOL DISTRICT, AND CHEERLEADERS MUST GO WITH THE GROUP. IF RIDING HOME WITH PARENT, YOU MUST HAVE A NOTE.
3. A DECISION WILL BE MADE ON MONDAY FOR THE PRACTICES, PERFORMANCES, AND UNIFORMS FOR THE WEEK. CHEERLEADERS MUST BE IN UNIFORM FOR PERFORMANCES. (SUIT, SOCKS, SHOES, HAIR IN PONYTAIL, PULLED UP OUT OF FACE, NO BANGS OR SIDE HAIR DOWN, AND HAIR BOW) CHEERLEADERS MUST BE DRESSED OUT IN T-SHIRT, SHORTS, AND TENNIS SHOES FOR PRACTICES.
4. REASONS FOR ABSENCES FROM PRACTICE, PERFORMANCE, OR FUNDRAISERS MUST BE GIVEN TO THE SPONSOR PRIOR TO THE EVENT. IF THERE IS REASON YOU CANNOT PARTICIPATE IN PRACTICE DUE TO INJURY OR ILLNESS, A DR'S NOTE IT REQUIRED. IF I HAVE NO NOTE, YOU WILL BE REQUIRED TO PARTICIPATE. **ABSENCES HINDER THE ENTIRE TEAM! IF A CHEERLEADER IS ABSENT FOR MORE THAN ONE PRACTICE A WEEK, WHETHER IT IS EXCUSED OR UNEXCUSED, THEY MAY NOT BE ALLOWED TO PERFORM AT THE PERFORMANCES FOR A WEEK. THIS MAY ALSO INCLUDE PRACTICES DURING TUTORIALS. IT IS VERY IMPORTANT TO ATTEND SCHOOL EVERYDAY SO YOU DON'T FALL BEHIND IN YOUR SCHOOL WORK AND HAVE TO MISS PRACTICE DURING TUTORIALS TO MAKE UP YOUR WORK.**
5. SOME PRACTICES MAY BE DURING SCHOOL DURING TUTORIALS. HOWEVER, SOME PRACTICES MAY BE SCHEDULED BEFORE OR AFTER SCHOOL.
6. IF YOU ARE LATE TO A PERFORMANCE MORE THAN 15 MINUTES, YOU CANNOT CHEER THAT GAME AND MUST SIT BY THE SPONSOR.
7. **IF YOU ARE TOO ILL TO CHEER, YOU ARE TOO ILL TO ATTEND GAMES, PEP RALLIES, ETC. IF YOU CANNOT CHEER AT THE PEP RALLY THEN YOU CANNOT CHEER AT THE GAME AND VIS VERSA.** IF YOU ARE HURT AND CANNOT CHEER, YOU WILL SIT WITH THE SPONSOR. A DOCTOR'S EXCUSE IS REQUIRED IF YOU ARE UNABLE TO PRACTICE FOR AN ENTIRE WEEK.
8. IF YOU ARE ABSENT THE ENTIRE DAY ON A GAME DAY, YOU CANNOT PARTICIPATE AT THE PEP RALLY OR GAME. **YOU MAY NOT ATTEND THE PEP RALLY, GAME, OR PRACTICE IF YOU ARE ABSENT THE ENTIRE DAY.**
9. CHEERLEADERS MUST BE PICKED UP FROM PRACTICES AND PERFORMANCES ON TIME. IT IS THE RESPONSIBILITY OF THE

CHEERLEADER FROM THE SQUAD WHO EXHIBITS BEHAVIOR NOT CONSIDERED ETHICAL OR MORAL. THE SPONSOR ALSO HAS THE RIGHT TO BENCH A CHEERLEADER FROM PERFORMANCES WHO EXHIBITS BEHAVIOR NOT CONSIDERED ETHICAL OR MORAL.

* IT IS THE APPLICANT'S RESPONSIBILITY TO RETURN ALL FORMS TO THE SPONSOR.

DUTIES

ALL DUTIES, RESPONSIBILITES, AND EXPECTATIONS BEGIN AT THE TIME OF TRYOUTS. AS A CHEERLEADER, YOU ARE PART OF A TEAM, AND YOU WILL BE EXPECTED TO ACT AS SUCH. ALL DUTIES ARE UNABLE TO BE OUTLINED, HOWEVER, THESE SERVE AS THE VERY MINIMUM THAT WILL BE EXPECTED.

- CREATE SIDELINE SIGNS AND RUN-THROUGH SIGNS
- ATTEND FOR THE FULL DURATION AND ACTIVELY SUPPORT ALL ASSIGNED SPORTING EVENTS. NO ONE EVENT IS ANY LESS IMPORTANT THAN ANOTHER.
- ATTEND AND ACTIVELY PARTICIPATE IN ALL ASSIGNED PRACTICES.
- ATTEND AND ACTIVELY PARTICIPATE IN ANY FORM OF CAMP OR INSTRUCTION AS ASSIGNED BY THE SPONSOR. CAMP DATES ARE [illegible], FROM 9-3. ALL CHEERLEADERS MUST ATTEND THE ENTIRE CAMP. *IF YOU ARE NOT GOING TO BE ABLE TO ATTEND CAMP, YOU SHOULD NOT TRY OUT.*
- EACH SQUAD MEMBER WILL PARTICIPATE IN ALL ASSIGNED FUND RAISING ACTIVITIES.
- ONE MUST KNOW ALL CHEERS, CHANTS, STUNTS, AND DANCES AND BE ABLE TO PERFORM THEM IN ORDER TO BE INCLUDED AT EVENTS.
- MAINTAIN PASSING GRADES AND GOOD CONDUCT MARKS.
- ATTEND SCHOOL

SITUATIONS NOT COVERED SPECIFICALLY IN THIS PACKET WILL BE HANDLED AT THE DISCRETION OF THE SPONSOR AND SCHOOL ADMINISTRATORS.

Addendum to KHS Cheerleader By-Laws

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- Squad members that represent themselves, or the squad in an unfavorable, questionable, or illegal manner through electronic media (i.e. websites, personal home pages, social media, blogs, text messages, chat rooms or similar websites/files accessible through a server or internet) or using electronic communication devices in such a way as to bring discredit, dishonor, or disgrace on their squad or members of any other school organization including themselves (i.e. camera phones, digital photos, electronic descriptions) will be subject to the disciplinary actions determined by appropriate school officials and/or sponsors/directors/coaches, which may include dismissal from the squad. Any action can/will be taken by the school in addition to that from the squad if outside activity occurs and is seen as a potential problem for the school.

Chet Deaver, Assistant Principal, KHS

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Cheerleader (Printed Name) _____

Parent/Guardian Name _____

JOHN DOE, Father of Minor Daughter H.S.; JANE DOE, Mother of Minor Daughter H.S.; H. S., Minor Daughter of John and Jane Doe, Plaintiffs - Appellants v. SILSBEE INDEPENDENT SCHOOL DISTRICT; RICHARD BAIN, JR., Superintendent; GAYE LOKEY, Principal; SISSY MCINNIS; RAKHEEM BOLTON; DAVID SHEFFIELD, Defendants - Appellees

No. 09-41075 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

402 Fed. Appx. 852; 2010 U.S. App. LEXIS 19368

September 16, 2010, Filed

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Doe v. Silsbee Indep. Sch. Dist., 131 S. Ct. 2875, 179 L. Ed. 2d 1188, 2011 U.S. LEXIS 3464 (U.S., 2011)*
Decision reached on appeal by, Remanded by *Doe v. Silsbee Indep. Sch. Dist., 2011 U.S. App. LEXIS 18888 (5th Cir. Tex., Sept. 12, 2011)*

PRIOR HISTORY: [1]**
Appeal from the United States District Court for the Eastern District of Texas. No. 1:09-CV-374.

DISPOSITION: AFFIRMED.

COUNSEL: For JOHN DOE, Father of Minor Daughter H.S., JANE DOE, Mother of Minor Daughter H.S., H. S., Minor Daughter of John and Jane Doe, Plaintiffs - Appellants: Laurence Wade Watts, Watts & Associates, Missouri City, TX.

For SILSBEE INDEPENDENT SCHOOL DISTRICT, RICHARD BAIN, JR., Superintendent, GAYE LOKEY, Principal, SISSY MCINNIS, Defendants - Appellees: Tanner Truett Hunt, Jr., Wells, Peyton, Greenberg & Hunt, L.L.P., Beaumont, TX.

For DAVID SHEFFIELD, Defendant - Appellee: Larry James Simmons, Jr., Benjamin Eliot New, Esq., Kelli Burris Smith, Germer Gertz, L.L.P., Beaumont, TX.

JUDGES: Before GARZA, CLEMENT, and OWEN, Circuit Judges.

OPINION

[*853] PER CURIAM:*

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4.*

Parents John and Jane Doe, and their minor daughter, H.S. (collectively, "Appellants"), appeal the district court's *FED.R.CIV.P.12(B)(6)* dismissal of their *42 U.S.C. § 1983* claims against District Attorney David Sheffield ("Sheffield"), Silsbee Independent School **[**2]** District ("SISD"), Richard Bain, Jr., Gaye Lokey, Sissy McInnis (collectively, "Appellees"), and Rakheem Bolton.[1]

1 Pursuant to supplemental state law claims, Bolton is a party to this appeal. He has not filed any briefing on appeal.

This claim arises from John and Jane Doe's allegation that their daughter, H.S., was sexually assaulted at a party by Bolton and Christian Rountree,[2] fellow students at H.S.'s high school. Appellants claim that after the arrest, Sheffield told them that despite having enough evidence to go to trial, the grand jury was racially divided and therefore would not vote to return an indictment against Rountree and Bolton, who were African-American. The grand jury ultimately voted against indicting Rountree and Bolton. Appellants claim that after the vote, they heard derogatory comments in the community about H.S. that indicated a detailed knowledge of the official investigation and grand jury proceedings.

2 Rountree is no longer a party to this appeal.

As a cheerleader for SISD, H.S. was contractually required to cheer for the basketball team, whose roster included Bolton. At a February game, H.S. cheered for the team but refused to cheer for Bolton individually. As **[**3]** a result, Bain and Lokey told H.S. that she had either to cheer when the others cheered or to go home. H.S. chose to leave, and McInnis subsequently removed her from the squad for the rest of the year. H.S. was permitted to try out for the squad again the following year.

Appellants originally filed a complaint under *42 U.S.C. § 1983*. Appellees filed *FED. R. CIV. P. 12(b)(6)* motions for failure to state a claim. The district court denied Appellees' motions but requested that Appellants file an amended complaint that "clearly and concisely state[d] factual allegations that support[ed] the elements of the asserted causes of action." Appellants filed an amended complaint. Appellees again moved to dismiss for failure to state a claim. This time, the district court granted the motion to dismiss. This appeal followed.

[*854] We review de novo a *Rule 12(b)(6)* dismissal of a claim, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *True v. Robles, 571 F.3d 412, 417 (5th Cir. 2009)* (internal quotation marks and citation omitted). *FED R. CIV. P. 8(a)(2)* requires that a pleading contain a "short and plain statement of the claim showing that **[**4]** the pleader is entitled to relief." A *Rule 12(b)(6)* dismissal for failure to state a claim is appropriate when the plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face, and when the plaintiff fails to plead facts "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

To state a claim under *§ 1983*, a plaintiff must allege that a state actor has violated "a right secured by the Constitution and laws of the United States." *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (citing *Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981))*. Appellants claim that Sheffield deprived H.S. of her right to freedom from bodily injury and stigmatization, which Appellants allege are protected liberty interests under the *Fourteenth Amendment*. Specifically, they argue that subsequent to the grand jury's decision not to indict Rountree and Bolton, Sheffield "defamed" H.S. in a press conference and illegally revealed details of the indictment hearing. Appellants are correct that "bodily integrity" constitutes a protected **[**5]** liberty interest under the *Fourteenth Amendment. See, e.g., Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 450-51 (5th Cir. 1994)* (holding that a student was deprived of a protected liberty interest when sexually assaulted by her teacher). However, psychological injury *alone* does not constitute a violation of bodily integrity as contemplated under the *Fourteenth Amendment. See Parham v. J.R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979)* (involving physical confinement); *Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)* (involving corporal punishment); *Spacek v. Charles, 928 S.W.2d 88 (Tex. App.))* Houston 1996) (involving corporal punishment). Furthermore, freedom from false stigmatization does not constitute a protected liberty interest under the *Fourteenth Amendment*. Our case law "does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the *Due Process Clause*." *Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)*. Accordingly, Appellants have not stated valid claims for violation of any liberty interests protected by the *Fourteenth Amendment*.

Appellants also contend that SISD, Bain, **[**6]**

Lokey, and McInnis deprived H.S. of a property interest protected by the *Fourteenth Amendment*. Specifically, they claim that H.S. had a property interest in her position on the cheer squad, and Lokey and McInnis deprived H.S. of that interest when they removed her from the cheer squad. "[S]tudents do not possess a constitutionally protected interest in their participation in extracurricular activities." *NCAA v. Yeo, 171 S.W.3d 863, 865 (Tex. 2005)*. Moreover, according to the terms of H.S.'s cheerleading contract, her failure to cheer constituted valid grounds for her removal from the cheer squad. Accordingly, the district court was correct in dismissing Appellants' claim for unconstitutional deprivation of property.

Appellants further argue that SISD, Bain, Lokey, and McInnis violated H.S.'s right to equal protection. Specifically, they claim H.S. was treated differently **[*855]** "because she is a female." "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." *U.S. v. Crew, 916 F.2d 980, 984 (5th Cir. 1990)* (citing *Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)*, and *Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977))*. **[**7]** Because Appellants make no showing that H.S.'s gender motivated any of Appellees' actions, their equal protection argument fails.

Appellants allege Sheffield deprived H.S. of her *First Amendment* right to freedom of speech by retaliating against her for filing sexual assault charges against Bolton and Rountree. However, Appellants make no showing that Sheffield's alleged retaliatory acts relate to H.S.'s accusations against Rountree and Bolton. Accordingly, the district court properly dismissed this claim on Sheffield's *Rule 12(b)(6)* motion.

Finally, Appellants claim SISD, Bain, Lokey, and McInnis violated H.S.'s right to free speech under the *First Amendment* because H.S.'s decision not to cheer constituted protected speech inasmuch as it was a symbolic expression of her disapproval of Bolton's and Rountree's behavior. Courts have long held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 511, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)*. In order to determine whether conduct "possesses sufficient communicative elements to bring the *First Amendment* into play, [we] must ask whether an **[**8]** intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Canady v Bossier Parish School Board, 240 F.3d 437, 440 (5th Cir. 2001)* (citing *Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989))*.

Appellants contend the district court erred in holding that H.S. "did not convey the sort of particularized message that symbolic conduct must convey to be protected speech." Even assuming *arguendo* that H.S.'s speech was sufficiently particularized to warrant *First Amendment* protection, student speech is not protected when that speech would "substantially interfere with the work of the school." *Tinker, 393 U.S. at 509*. "The question whether the *First Amendment* requires a school to tolerate particular student speech . . . is different from the question whether [it] requires a school affirmatively to promote particular speech." *Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 270, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988)*. In her capacity as cheerleader, H.S. served as a mouthpiece through which SISD could disseminate speech?namely, support for its athletic teams. Insofar as the *First Amendment* does not require schools to promote particular student **[**9]** speech, SISD had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit. Moreover, this act constituted substantial interference with the work of the school because, as a cheerleader, H.S. was at the basketball game for the purpose of cheering, a position she undertook voluntarily. Accordingly, we affirm the district court's dismissal of Appellants' *First Amendment* claim against SISD, Bain, Lokey, and McInnis.

Neither Appellants' complaint, nor any of their subsequent filings, assert constitutional violations against Sheffield, SISD, Bain, Lokey, or McInnis upon which Appellants could plausibly recover under *42 U.S.C. § 1983*. Therefore, the district court did not err in dismissing Appellants' claims. Furthermore, the district court **[*856]** was within its discretion to decline to exercise supplemental jurisdiction over Appellants' state law claims against Bolton.

AFFIRMED.

GIL GARCETTI, et al., Petitioners v. RICHARD CEBALLOS

No. 04-473

SUPREME COURT OF THE UNITED STATES

547 U.S. 410; 126 S. Ct. 1951; 164 L. Ed. 2d 689; 2006 U.S. LEXIS 4341; 74 U.S.L.W. 4257; 152 Lab. Cas. (CCH) P60,203; 87 Empl. Prac. Dec. (CCH) P42,353; 24 I.E.R. Cas. (BNA) 737

October 12, 2005, Argued; March 21, 2006, Reargued
May 30, 2006, Decided

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Ceballos v. Garcetti, 361 F.3d 1168, 2004 U.S. App. LEXIS 5328 (9th Cir. Cal., 2004)

DISPOSITION: Reversed and remanded.

SYLLABUS

Respondent Ceballos, a supervising deputy district attorney, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit made serious misrepresentations, Ceballos relayed his findings to his supervisors, petitioners here, and followed up with a disposition memorandum recommending dismissal. Petitioners nevertheless proceeded with the prosecution. At a hearing on a defense motion to challenge the warrant, Ceballos recounted **[***694]** his observations about the affidavit, but the trial court rejected the challenge. Claiming that petitioners then retaliated against him for his memo in violation of the *First* and *Fourteenth Amendments*, Ceballos filed a *42 U.S.C. § 1983* suit. The District Court granted petitioners summary judgment, ruling, *inter alia*, that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. Reversing, the Ninth Circuit held that the memo's allegations were protected under the *First Amendment* analysis in *Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811*, and *Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708*.

Held:

When public employees make statements pursuant to their official duties, they are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline.

(a) Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *Pickering, supra, at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811*. If the answer is no, the employee has no *First Amendment* cause of action based on the employer's reaction to the speech. See *Connick, supra, at 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. If the answer is yes, the possibility of a *First Amendment* claim arises. The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering, supra, at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811*. This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Cf. *Connick, supra, at 143, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. The *First Amendment* limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their

capacities as private citizens. See *Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570.* So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra, at 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708.*

(b) Proper application of the Court's precedents leads to the conclusion that the *First Amendment* does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail. The dispositive factor here is not that Ceballos expressed his views inside his office, rather **[***695]** than publicly, see, *e.g., Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414, 99 S. Ct. 693, 58 L. Ed. 2d 619*, nor that the memo concerned the subject matter of his employment, see, *e.g., Pickering, supra, at 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* Rather, the controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the *First Amendment* provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700.* This result is consistent with the Court's prior emphasis on the potential societal value of employee speech and on affording government employers sufficient discretion to manage their operations. Ceballos' proposed contrary rule, adopted by the Ninth Circuit, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in the Court's precedents. The doctrinal anomaly the Court of Appeals perceived in compelling public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties misconceives the theoretical underpinnings of this Court's decisions and is unfounded as a practical matter.

(c) Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the *First Amendment.* However, the Court's precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

361 F.3d 1168, reversed and remanded.

COUNSEL: Cindy S. Lee argued and reargued the cause for petitioners.

Dan Himmelfarb argued the cause, and **Edwin S. Kneedler** reargued the cause, for the United States, as amicus curiae, by special leave of court.

Bonnie I. Robin-Vergeer argued and reargued the cause for respondent.

JUDGES: Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion; *post,* p.____. Souter, J., filed a dissenting opinion, in which Stevens and Ginsburg, JJ. joined, *post,* p.____. Breyer, J., filed a dissenting opinion, *post,* p.____.

OPINION BY: KENNEDY

OPINION

[*413] **[**1955]** Justice **Kennedy** delivered the opinion of the Court.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A] **[***LEdHR3A]** [3A] It is well settled that "a State cannot condition public employment **[***696]** on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).* The question presented by the instant case is

whether the *First Amendment* protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he **[*414]** had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained **[**1956]** Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted **[*415]** his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment **[***697]** actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, *42 U.S.C. § 1983*. He alleged petitioners violated the *First* and *Fourteenth Amendments* by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the *First Amendment*. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to *First Amendment* protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the *First Amendment*." *361 F.3d 1168, 1173 (2004)*. In reaching its conclusion the court looked to the *First Amendment* analysis set forth in *Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*, and *Connick, supra*. *Connick* instructs courts to begin by considering **[*416]** whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id., at 146-147, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. The Court of Appeals determined that

Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." *361 F.3d, at 1174.* The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of *First Amendment* protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id., at 1174-1175* (citing cases including **[**1957]** *Roth v. Veteran's Admin. of Govt. of United States, 856 F.2d 1401 (CA9 1988)).*

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering, supra, at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See *361 F.3d, at 1180.* The court further concluded that Ceballos' *First Amendment* rights were clearly established and that petitioners' **[***698]** actions were not objectively reasonable. See *id., at 1181-1182.*

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id., at 1185.* Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id., at 1187.* In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest **[*417]** in the content of that speech that gives rise to a *First Amendment* right." *Id., at 1189.*

We granted certiorari, *543 U.S. 1186, 125 S. Ct. 1395, 161 L. Ed. 2d 188 (2005)*, and we now reverse.

II

[*LEdHR4A]** [4A] As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment--including those which restricted the exercise of constitutional rights." *Connick, 461 U.S., at 143, 103 S. Ct. 1684, 75 L. Ed. 2d 708.* That dogma has been qualified in important respects. See *id., at 144-145, 103 S. Ct. 1684, 75 L. Ed. 2d 708.* The Court has made clear that public employees do not surrender all their *First Amendment* rights by reason of their employment. Rather, the *First Amendment* protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e.g., Pickering, supra, at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811*; *Connick, supra, at 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708*; *Rankin v. McPherson, 483 U.S. 378, 384, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)*; *United States v. National Treasury Emples. Union, 513 U.S. 454, 466, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995).*

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. *391 U.S., at 566, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id., at 568, 88 S. Ct. 1731 20 L. Ed. 2d 811.* The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id., at 572-573, 88 S. Ct. 1731, 20 L. Ed. 2d 811* (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly **[*418]** greater than its interest in limiting a similar contribution **[**1958]** by any member of the general public." *Id., at 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811.*

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public **[***699]** employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id., at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* If the answer is no, the employee has no *First Amendment* cause of action based on his or her employer's reaction to the speech. See *Connick, supra,*

at 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708. If the answer is yes, then the possibility of a *First Amendment* claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering, 391 U.S., at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." *Id., at 569, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g., Waters v. Churchill, 511 U.S. 661, 671, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994)* (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick,* **[*419]** *supra, at 143, 103 S. Ct. 1684, 75 L. Ed. 2d 708* ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

[*LEdHR3B]** [3B] **[***LEdHR4B]** [4B] At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The *First Amendment* limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).* So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra, at 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708* ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the *First Amendment* **[***700]** interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its **[**1959]** holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." *391 U.S., at 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id., at 572, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. **[*420]** See, *e.g., San Diego v. Roe, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Emples., 513 U.S., at 470, 115 S. Ct. 1003, 130 L. Ed. 2d 964* ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

[*LEdHR4C]** [4C] The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g., Rankin, 483 U.S., at 384, 107 S. Ct. 2891, 97 L. Ed. 2d 315* (recognizing "the dual role of the public employer as a

provider of public services and as a government entity operating under the constraints of the *First Amendment*"). Underlying our cases has been the premise that while the *First Amendment* invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick, 461 U.S., at 154, 103 S. Ct. 1864, 75 L. Ed. 2d 708.*

III

[*LEdHR5]** [5] With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive *First Amendment* protection for expressions made at work. See, *e.g., Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979).* Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public **[*421]** employees like "any member of the general public," *Pickering, 391 U.S., at 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811,* to hold that all speech within the office is automatically exposed to restriction.

[*701]** The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The *First Amendment* protects some expressions related to the speaker's job. See, *e.g., ibid.; Givhan, supra, at 414, 99 S. Ct. 693, 58 L. Ed. 2d 619.* As the Court noted in *Pickering:* "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *391 U.S., at 572, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* The same is true of many other categories of public employees.

[*LEdHR1B]** [1B] **[***LEdHR2B]** [2B] The controlling factor in Ceballos' case is that his expressions were **[**1960]** made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration--the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case--distinguishes Ceballos' case from those in which the *First Amendment* provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline.

[*LEdHR2C]** [2C] Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his *First Amendment* rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe **[*422]** any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)* ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

[*LEdHR1C]** [1C] This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra, at ____ - ____, 164 L. Ed. 2d, at 699-700, 126 S. Ct. 1951.* Refusing to **[***702]** recognize *First Amendment* claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of

protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure **[*423]** that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or **[**1961]** misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the *First Amendment* requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. See *361 F.3d, at 1176*. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of *First Amendment* protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering, supra,* or discussing politics with a co-worker, see *Rankin,* **[*424]** *483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315*. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee **[***703]** makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

[*LEdHR1D]** [1D] **[***LEdHR2D]** [2D] Proper application of our precedents thus leads to the conclusion that the *First Amendment* does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

[*LEdHR6]** [6] Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post, at ____, n 2, 164 L. Ed. 2d, at 707* (Souter, J. , dissenting). The proper inquiry is a practical one. **[**1962]** Formal job descriptions often bear little resemblance to the duties an employee actually is **[*425]** expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is

within the scope of the employee's professional duties for *First Amendment* purposes.

Second, Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post, at ____ - ____, 164 L. Ed. 2d, at 712.* There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." *461 U.S., at 149, 103 S. Ct. 1684, 75 L. Ed. 2d 708.* The dictates of sound judgment are reinforced by the powerful network of legislative enactments--such as whistle-blower protection laws and labor codes--available to those who seek to expose wrongdoing. See, *e.g., 5 U.S.C. § 2302(b)(8)*; *Cal. Govt. Code Ann. § 8547.8* (West 2005); *Cal. Lab. Code Ann. § 1102.5* (West Supp. 2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of **[***704]** conduct and constitutional obligations apart from the *First Amendment*. See, *e.g., Cal. Rule Prof. Conduct 5-110 (2005)* ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).* These imperatives, as well as obligations arising from any **[*426]** other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

[*LEdHR1E]** [1E] We reject, however, the notion that the *First Amendment* shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: JUSTICE STEVENS; JUSTICE SOUTER; JUSTICE BREYER

DISSENT

Justice **Stevens,** dissenting.

The proper answer to the question "whether the *First Amendment* protects a government employee from discipline based on speech made pursuant to the employee's official duties," *ante, at ____, 164 L. Ed. 2d, at 696*, is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided," *ante, at ____, 164 L. Ed. 2d, at 702.* But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover? *

* See, *e.g., Branton v. Dallas, 272 F.3d 730 (CA5 2001)* (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller v. Jones, 444 F.3d 929, 936 (CA7 2006)* (police officer demoted after opposing the police chief's attempt to "us[e] his official position to coerce a financially independent organization into a potentially ruinous merger"); *Delgado v. Jones, 282 F.3d 511 (CA7 2002)* (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts v. Smith, 345 F.3d 581 (CA8 2003)* (school district official's contract was not renewed after she gave frank testimony about the district's desegregation efforts); *Kincade v. Blue Springs, 64 F.3d 389 (CA8 1995)* (engineer fired after reporting to his supervisors that contractors were failing to complete dam-related projects and that the resulting dam might be structurally unstable); *Fox v. District of Columbia, 83 F.3d 1491, 1494 (CADC 1996)* (D. C. Lottery Board security officer fired after informing the police about a theft made possible by "rather drastic managerial ineptitude").

[*427] [**1963] As Justice Souter explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979).* We had no difficulty recognizing that the [***705] *First Amendment* applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. See *id., at 413-416, 99 S. Ct. 693, 58 L. Ed. 2d 619.* Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in Justice Souter's dissenting opinion it is surely "misguided."

Justice **Souter,** with whom Justice **Stevens** and Justice **Ginsburg** join, dissenting.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." *Ante, at ____, 164 L. Ed. 2d, at 701.* I respectfully dissent. [*428] I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim *First Amendment* protection.

I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the *First Amendment.* See, *e.g., Schenck v. Pro-Choice Network of Western N. Y., 519 U.S. 357, 377, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997).* At the other extreme, [**1964] a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).* In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. *Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).* Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the *First Amendment,* in part, because a government paycheck does nothing to eliminate the value to an individual of speaking [***706] on public matters, and there is no good [*429] reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the *First Amendment* safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill, 511 U.S. 661, 674, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994).*

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded

eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979)*, we followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, *439 U.S., at 413-414, 99 S. Ct. 693, 58 L. Ed. 2d 619*, and the same point was clear in *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976)*. That case was decided, in part, with reference to the *Pickering* framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. *Madison* noted that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." *429* **[*430]** *U.S., at 174-175, 97 S. Ct. 421, 50 L. Ed. 2d 376.* In each case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and *Givhan* stands for the same conclusion even when the speech is not addressed to the public at large. Cf. *Pegram v. Herdrich, 530 U.S. 211, 225, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)* (recognizing that, factually, a **[**1965]** trustee under the Employee Retirement Income Security Act of 1974 can both act as ERISA fiduciary and act on behalf of the employer).

The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants. This is an odd place to **[***707]** draw a distinction, [1] and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered "pursuant to . . . official duties," *ante, at ____, 164 L. Ed. 2d, at 701.*

1 It seems stranger still in light of the majority's concession of some *First Amendment* protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper. *Ante, at ____, 164 L. Ed. 2d, at 702.*

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public **[*431]** value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties. [2]

2 I do not say the value of speech "pursuant to . . . duties" will always be greater, because I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from *First Amendment* purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school. Hence today's rule presents the regrettable prospect that protection under *Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*, may be diminished by expansive statements of employment duties. The majority's response, that the enquiry to determine duties is a "practical one," *ante, at ____, 164 L. Ed. 2d, at 703*, does not alleviate this concern. It sets out a standard that will not discourage government employers from setting duties expansively, but will engender

litigation to decide which stated duties were actual and which were merely formal.

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without *First Amendment* recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in **[**1966]** speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the *First Amendment* **[*432]** gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores **[***708]** the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation"; [3] these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract. [4] There is no question that public employees speaking on matters they are obliged to address would generally **[*433]** place a high value on a right to speak, as any responsible citizen would.

3 R. Frost, Two Tramps in Mud Time, Collected Poems, Prose, & Plays 251, 252 (R. Poirier & M. Richardson eds. 1995).

4 Not to put too fine a point on it, the Human Resources Division of the Los Angeles County District Attorney's Office, Ceballos's employer, is telling anyone who will listen that its work "provides the personal satisfaction and fulfillment that comes with knowing you are contributing essential services to the citizens of Los Angeles County." Career Opportunities, http://da.co.la.ca.us/hr/default.htm (all Internet materials as visited May 25, 2006, and available in Clerk of Court's case file). The United States expresses the same interest in identifying the individual ideals of a citizen with its employees' obligations to the Government. See Brief as *Amicus Curiae* 25 (stating that public employees are motivated to perform their duties "to serve the public"). Right now, for example, the U.S. Food and Drug Administration is appealing to physicians, scientists, and statisticians to work in the Center for Drug Evaluation and Research, with the message that they "can give back to [their] community, state, and country by making a difference in the lives of Americans everywhere." Career Opportunities at CDER: You Can Make a Difference, http://www.fda.gov/cder/career/default.h tm. Indeed, the Congress of the United States, by concurrent resolution, has previously expressly endorsed respect for a citizen's obligations as the prime responsibility of Government employees: "Any person in Government Service should: . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and shall "[e]xpose corruption wherever discovered," Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess (1958), 72 Stat. B12. Display of this Code in Government buildings was once required by law, 94 Stat. 855; this obligation has been repealed, Office of Government Ethics Authorization Act of 1996, Pub. L. 104-179, § 4, 110 Stat. 1566.

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. Last Term, we recalled the public value that the *Pickering* Court perceived in the speech of public employees as a class: "Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego v. Roe, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam)* (citation omitted). This is not a whit

less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory **[**1967]** report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers **[***709]** beyond the reach of *First Amendment* protection against retaliation.)

Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out **[*434]** coherently through the ranks. "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Ante, at ____, 164 L. Ed. 2d, at 702*. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of *First Amendment* protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before, *supra, at ____ - ____, 164 L. Ed. 2d, at 706*? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. See n 4, *supra*. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.

Two reasons in particular make me think an adjustment using the basic *Pickering* balancing scheme is perfectly feasible here. First, the extent of the government's legitimate authority over subjects of speech required by a public job **[*435]** can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in **[***710]** an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on *42 U.S.C. § 1983* (or *Bivens* **[**1968]** *v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*) before they get filed, the standard itself would sift them out at the summary-judgment stage. [5]

> 5 As I also said, a public employer is entitled (and obliged) to impose high standards of honesty, accuracy, and judgment on employees who speak in doing their work. These criteria are not, however, likely to discourage meritless litigation or provide a handle for summary judgment. The employee who has spoken out, for example, is unlikely to blame himself for prior bad judgment before he sues for retaliation.

My second reason for adapting *Pickering* to the circumstances at hand is the experience in Circuits that have recognized claims like Ceballos's here. *First Amendment* protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation. There has indeed been some: as represented by Ceballos's lawyer at oral

argument, each year over the last five years, approximately 70 cases in the different Courts of Appeals and approximately 100 in the various District Courts. Tr. of Oral Arg. 58-59. But even these figures reflect a readiness to litigate that might well have been cooled by my view about **[*436]** the importance required before *Pickering* treatment is in order.

For that matter, the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made "pursuant to . . . official duties," *ante, at ____, 164 L. Ed. 2d, at 701.* In fact, the majority invites such litigation by describing the enquiry as a "practical one," *ante, at ____, 164 L. Ed. 2d, at 703*, apparently based on the totality of employment circumstances. [6] See n 2, *supra.* Are prosecutors' discretionary statements about cases addressed to the press on the courthouse steps made "pursuant to their official duties"? Are government nuclear scientists' complaints to their supervisors about a colleague's improper handling of radioactive materials made "pursuant" to duties?

> 6 According to the majority's logic, the litigation it encourages would have the unfortunate result of "demand[ing] permanent judicial intervention in the conduct of governmental operations," *ante, at ____, 164 L. Ed. 2d, at 702.*

II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistle-blower statutes.

A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see *ante, at ____, 164 L. Ed. 2d, at 701*, and should thus be differentiated as a matter of law from the personal statements the *First Amendment* protects, see *Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).* The majority invokes the interpretation set out in *Rosenberger v. Rector and Visitors of* **[***711]** *Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*, of *Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*, which **[*437]** held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning, *id., at 192-200, 111 S. Ct. 1759, 114 L. Ed. 2d 233.* We have read *Rust* to mean that "when the government appropriates **[**1969]** public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger, supra, at 833, 115 S. Ct. 2510, 132, L. Ed. 2d 700.*

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation v. Velazquez, 531 U.S. 533, 542, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).* There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust.* Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust*, and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.

[*438] It is not, of course, that the district attorney lacked interest of a high order in what Ceballos might say. If his speech undercut effective, lawful prosecution, there would have been every reason to rein him in or fire him; a statement that created needless tension among law enforcement agencies would be a fair subject of concern,

and the same would be true of inaccurate statements or false ones made in the course of doing his work. But these interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust.* Nor did the county petitioners here even make such a claim in their answer to Ceballos's complaint, see n 13, *infra.*

The fallacy of the majority's reliance on *Rosenberger*'s understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> **[***712]** "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante, at ____, 164 L. Ed. 2d, at 701.*

This ostensible domain beyond the pale of the *First Amendment* is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil *First Amendment* protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties." See *Grutter v. Bollinger, 539 U.S. 306, 329, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)* ("We have long recognized that, given the **[**1970]** important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional **[*439]** tradition"); *Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)* ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the *First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton v. Tucker, 364 U.S. 479, 487, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)*)); *Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957)* (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression--areas in which government should be extremely reticent to tread").

B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the *First Amendment* has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses. See *ante, at ____ - ____, 164 L. Ed. 2d, at 703-704.* But even if I close my eyes to the tenet that "'[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law,'" *Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 680, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996)*, the majority's counsel to rest easy fails on its own terms. [7]

> 7 Even though this Court has recognized that *42 U.S.C. § 1983* "does not authorize a suit for every alleged violation of federal law," *Livadas v. Bradshaw, 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)*, the rule is that "*§ 1983* remains a generally and presumptively available remedy for claimed violations of federal law," *id., at 133, 114 S. Ct. 2068, 129 L. Ed. 2d 93.* Individual enforcement under *§ 1983* is rendered unavailable for alleged violations of federal law when the underlying statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under *§ 1983.* See *Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119-120, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005).*

[*440] To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, **[***713]** defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan,* for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she was fired after a private conversation with the school principal. In any event, the combined variants of statutory

whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. Westman & N. Modesitt, Whistleblowing: Law of Retaliatory Discharge 67-75, 281-307 (2d ed. 2004). Some state statutes protect all government workers, including the employees of municipalities and other subdivisions; [8] others stop at state employees. [9] Some limit protection **[**1971]** to employees who tell their bosses before they speak out; [10] others forbid bosses from imposing any requirement to warn. [11] As for the federal Whistleblower Protection Act of 1989, *5 U.S.C. § 1213 et seq., (2000 ed. and Supp. III)*, **[*441]** current case law requires an employee complaining of retaliation to show that "'a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement,'" *White v. Department of Air Force, 391 F. 3d 1377, 1381 (CA Fed. 2004)* (quoting *Lachance v. White, 174 F.3d 1378, 1381 (CA Fed. 1999)*, cert denied, *528 U.S. 1153, 120 S. Ct. 1157, 145 L. Ed. 2d 1069 (2000)*. And federal employees have been held to have no protection for disclosures made to immediate supervisors, see *Willis v. Department of Agriculture, 141 F.3d 1139, 1143 (CA Fed. 1998)*; *Horton v. Department of Navy, 66 F.3d 279, 282 (CA Fed. 1995)*, cert denied, *516 U.S. 1176, 116 S. Ct. 1271, 134 L. Ed. 2d 218 (1996)*, or for statements of facts publicly known already, see *Francisco v. Office of Personnel Management, 295 F.3d 1310, 1314 (CA Fed. 2002)*. Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, *Huffman v. Office of Personnel Management, 263 F.3d 1341, 1352 (CA Fed. 2001)*, the very speech that the majority says will be covered by "the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing," *ante, at ____ - ____, 164 L. Ed. 2d, at 703*. [12] My point is not to disparage particular **[***714]** statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

8 *Del. Code Ann., Tit. 29, § 5115* (2003); *Fla. Stat. § 112.3187* (2003); *Haw. Rev. Stat. § 378-61* (1993); *Ky. Rev. Stat. Ann. § 61.101* (West 2005); *Mass. Gen. Laws, ch. 149, § 185* (West 2004); *Nev. Rev. Stat. § 281.611* (2003); *N. H. Rev. Stat. Ann. § 275-E:1* (Supp. 2005); *Ohio Rev. Code Ann. § 4113.51* (Lexis 2001); *Tenn. Code Ann. § 50-1-304* (2005).

9 *Ala. Code § 36-26A-1 et seq.* (2001); *Colo. Rev. Stat. § 24-50.5-101 et seq.* (2004); *Iowa Code § 70A.28 et seq.* (2005); *Kan. Stat. Ann. § 75-2973* (2003 Cum. Supp.); *Mo. Rev. Stat. § 105.055* (2004 Cum. Supp.); *N. C. Gen. Stat. Ann. § 126-84* (Lexis 2003); *Okla. Stat., Tit. 74, § 840-2.5 et seq.* (West Supp. 2005); *Wash. Rev. Code § 42.40.010* (2004); *Wyo. Stat. Ann. § 9-11-102* (2003).

10 *Idaho Code § 6-2104(1)(a)* (Lexis 2004); *Me. Rev. Stat. Ann., Tit. 26, § 833(2)* (1988); *Mass. Gen. Laws, ch. 149, § 185(c)(1)* (West 2004); *N. H. Rev. Stat. Ann. § 275-E:2(II)* (1999); *N. J. Stat. Ann. § 34:19-4* (West 2000); *N. Y. Civ. Serv. Law Ann. § 75-b(2)(b)* (West 1999); *Wyo. Stat. Ann. § 9-11-103(b)* (2003).

11 *Kan. Stat. Ann. § 75-2973(d)(2)* (Cum. Supp.); *Ky. Rev. Stat. Ann. § 61.102(1)* (West 2005); *Mo. Rev. Stat. § 105.055(2)* (2004 Cum. Supp.); *Okla. Stat., Tit. 74, § 840-2.5(B)(4)* (West 2005 Supp.); *Ore. Rev. Stat. § 659A.203(1)(c)* (2003).

12 See n 4, *supra*.

III

The Court remands because the Court of Appeals considered only the disposition memorandum and because Ceballos **[*442]** charges retaliation for some speech apparently outside the ambit of utterances "pursuant to their official duties." When the Court of Appeals takes up this case once again, it should consider some of the following facts that escape emphasis in the majority opinion owing to its focus. [13] Ceballos says he sought his position out of a personal commitment to perform civic work. After showing his superior, petitioner Frank Sundstedt, the disposition memorandum at issue in this case, Ceballos complied with Sundstedt's direction to tone down some accusatory rhetoric out of **[**1972]** concern that the memorandum would be unnecessarily incendiary when shown to the Sheriff's Department. After meeting with members of that department, Ceballos told his immediate supervisor, petitioner Carol Najera, that he thought *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215*

(1963), obliged him to give the defense his internal memorandum as exculpatory evidence. He says that Najera responded by ordering him to write a new memorandum containing nothing but the deputy sheriff's statements, but that he balked at that. Instead, he proposed to turn over the existing memorandum with his own conclusions redacted as work product, and this is what he did. The issue over revealing his conclusions arose again in preparing for the suppression hearing. Ceballos maintains that Sundstedt ordered Najera, representing the prosecution, to give the trial judge a full picture of the circumstances, but that Najera told Ceballos he would suffer retaliation if he testified that the affidavit contained intentional fabrications. In any event, Ceballos's testimony generally stopped short of his own conclusions. After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.

13 This case comes to the Court on the motions of petitioners for summary judgment, and as such, "[t]he evidence of [Ceballos] is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

[*443] Ceballos says that over the next six months his supervisors retaliated against him [14] not only for his written reports, see *ante, at ____, 164 L. Ed. 2d, at 696-697*, but also for his spoken statements to them and his hearing **[***715]** testimony in the pending criminal case. While an internal grievance filed by Ceballos challenging these actions was pending, Ceballos spoke at a meeting of the Mexican-American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegations of police misconduct, and the retaliatory acts he ascribed to his supervisors. Two days later, the office dismissed Ceballos's grievance, a result he attributes in part to his bar association speech.

14 Sundstedt demoted Ceballos to a trial deputy; his only murder case was reassigned to a junior colleague with no experience in homicide matters, and no new murder cases were assigned to him; then-District Attorney Gil Garcetti, relying in part on Sundstedt's recommendation, denied Ceballos a promotion; finally, Sundstedt and Najera transferred him to the office's El Monte Branch, requiring longer commuting. Before transferring Ceballos, Najera offered him a choice between transferring and remaining at the Pomona Branch prosecuting misdemeanors instead of felonies. When Ceballos refused to choose, Najera transferred him.

Ceballos's action against petitioners under *42 U.S.C. § 1983* claims that the individuals retaliated against him for exercising his *First Amendment* rights in submitting the memorandum, discussing the matter with Najera and Sundstedt, testifying truthfully at the hearing, and speaking at the bar meeting. [15] As I **[**1973]** mentioned, the Court of Appeals **[*444]** saw no need to address the protection afforded to Ceballos's statements other than the disposition memorandum, which it thought was protected under the *Pickering* test. Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

15 The county petitioners' position on these claims is difficult to follow or, at least, puzzling. In their motion for summary judgment, they denied that any of their actions was responsive to Ceballos's criticism of the sheriff's affidavit. *E.g.*, App. 159-160, 170-172 (maintaining that Ceballos was transferred to the El Monte Branch because of the decreased workload in the Pomona Branch and because he was next in a rotation to go there to serve as a "filing deputy"); *id.*, at 160, 172-173 (contending that Ceballos's murder case was reassigned to a junior colleague to give that attorney murder trial experience before he was transferred to the Juvenile Division of the District Attorney's Office); *id.*, at 161-162, 173-174 (arguing that Ceballos was denied a promotion by Garcetti despite Sundstedt's stellar review of Ceballos, when Garcetti was unaware of the matter in *People* v. *Cuskey*, the criminal case for which Ceballos wrote the pertinent disposition memorandum). Their reply to Ceballos's opposition to summary judgment, however, shows that petitioners argued for a *Pickering* assessment

(for want of a holding that Ceballos was categorically disentitled to any *First Amendment* protection) giving great weight in their favor to workplace disharmony and distrust caused by Ceballos's actions. *E.g.*, App. 477-478.

Justice **Breyer,** dissenting.

This case asks whether the *First Amendment* protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or Justice Souter's answer to the question presented.

I

I begin with what I believe is common ground:

(1) Because virtually all human interaction takes place through speech, the *First Amendment* cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently **[*445]** depending upon the general category of activity. Compare, **[***716]** *e.g., Burson v. Freeman, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992)* (plurality opinion) (political speech), with *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)* (commercial speech), and *Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)* (government speech).

(2) Where the speech of government employees is at issue, the *First Amendment* offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the *First Amendment* does not offer protection. *Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).* Where the employee speaks "as a citizen . . . upon matters of public concern," the *First Amendment* offers protection but only where the speech survives a screening test. *Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).* That test, called, in legal shorthand, "*Pickering* balancing," requires a judge to "balance . . . the interests" of the employee "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* See also *Connick, supra, at 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708.*

[1974]** (4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely, when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

[*446] II

The majority answers the question by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." *Ante, at ____, 164 L. Ed. 2d, at 701.* In a word, the majority says, "never." That word, in my view, is too absolute.

Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." *Ante, at ____, 164 L. Ed. 2d, at 702.* And I agree that the Constitution does not seek to "displac[e] . . . managerial discretion by judicial supervision." *Ibid.* Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available--to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters **[***717]** of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d*

215 (1963). The facts present two special circumstances that together justify *First Amendment* review.

First, the speech at issue is professional speech--the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. *Legal Services Corporation v. Velazquez, 531 U.S. 533, 544, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001)* ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and **[*447]** in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also *Polk County v. Dodson, 454 U.S. 312, 321, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981)* ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, *106 Yale L. J. 151, 172 (1996)* ("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*; *Brady, supra.* So, for example, might a prison doctor have a similar constitutionally related professional obligation **[**1975]** to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here.

III

While I agree with much of Justice Souter's analysis, I believe that the constitutional standard he enunciates fails **[*448]** to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government should prevail unless the employee (1) "speaks on a matter **[***718]** of unusual importance, " and (2) "satisfies high standards of responsibility in the way he does it." *Ante, at ____, 164 L. Ed. 2d, at 709* (dissenting opinion). Justice Souter adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Ibid.* .

There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment. This aspect of Justice Souter's "adjustment" of "the basic *Pickering* balancing scheme," *ibid.* is similar to the Court's present insistence that speech be of "legitimate news interest", when the employee speaks only as a private citizen see, *San Diego v. Roe, 543 U.S. 77, 83-84, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam)*. It gives no extra weight to the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties.

Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these **[*449]** categories bear any obvious relation to the constitutional importance

of protecting the job-related speech at issue.

The underlying problem with this breadth of coverage is that the standard (despite predictions that the government is likely to *prevail* in the balance unless the speech concerns "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," *ante, at ____, 164 L. Ed. 2d, at 709* (Souter, J., dissenting)) does not avoid the judicial need to *undertake the balance* in the first place. And this form of judicial activity--the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests--itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his **[**1976]** basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted.

At the same time, the list of categories substantially overlaps areas where the law already provides nonconstitutional protection through whistle-blower statutes and the like. See *ante, at ____, 164 L. Ed. 2d, at 712* (majority opinion); *ante, at ____ - ____, 164 L. Ed. 2d, at 712-714* (Souter, J., dissenting). That overlap diminishes the need for a constitutional forum and also means that adoption of the test would authorize Federal Constitution-based **[***719]** legal actions that threaten to upset the legislatively struck (or administratively struck) balance that those statutes (or administrative procedures) embody.

IV

I conclude that the *First Amendment* sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. **[*450]** But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

With respect, I dissent.

HAZELWOOD SCHOOL DISTRICT ET AL. v. KUHLMEIER ET AL.

No. 86-836

SUPREME COURT OF THE UNITED STATES

484 U.S. 260; 108 S. Ct. 562; 98 L. Ed. 2d 592; 1988 U.S. LEXIS 310; 56 U.S.L.W. 4079; 14 Media L. Rep. 2081

October 13, 1987, Argued
January 13, 1988, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION: *795 F. 2d 1368*, reversed.

SYLLABUS

Respondents, former high school students who were staff members of the school's newspaper, filed suit in Federal District Court against petitioners, the school district and school officials, alleging that respondents' *First Amendment* rights were violated by the deletion from a certain issue of the paper of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because the page proofs he was furnished identified by name (deleted by the teacher from the final version) a student who complained of her father's conduct, and the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication. Believing that there was no time to make necessary changes in the articles if the paper was to be issued before the end of the school year, the principal directed that the pages on which they appeared be withheld from publication even though other, unobjectionable articles were included on such pages. The District Court held that no *First Amendment* violation had occurred. The Court of Appeals reversed.

Held: Respondents' *First Amendment* rights were not violated. Pp. 266-276.

(a) *First Amendment* rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. Pp. 266-267.

(b) The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not deviate from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate the paper's

contents in any reasonable manner. Pp. 267-270.

(c) The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503*, distinguished. Educators do not offend the *First Amendment* by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. Pp. 270-273.

(d) The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper. Pp. 274-276.

COUNSEL: Robert P. Baine, Jr., argued the cause for petitioners. With him on the briefs were John Gianoulakis and Robert T. Haar.

Leslie D. Edwards argued the cause and filed a brief for respondents. *

* Ronald A. Zumbrun and Anthony T. Caso filed a brief for the Pacific Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by Janet L. Benshoof, John A. Powell, Steven R. Shapiro, and Frank Susman; for the American Society of Newspaper Editors et al. by Richard M. Schmidt, Jr.; for People for the American Way by Marvin E. Frankel; for the NOW Legal Defense and Education Fund et al. by Martha L. Minow, Sarah E. Burns, and Marsha Levick; for the Planned Parenthood Federation of America, Inc., et al. by Eve W. Paul; and for the Student Press Law Center et al. by J. Marc Abrams.

Briefs of amici curiae were filed for the National School Boards Association et al. by Gwendolyn H. Gregory, August W. Steinhilber, Thomas A. Shannon, and Ivan B. Gluckman; and for the School Board of Dade County, Florida, by Frank A. Howard, Jr., and Johnny Brown.

JUDGES: WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, post, p. 277.

OPINION BY: WHITE

OPINION

[*262] **[***599]** **[**565]** JUSTICE WHITE delivered the opinion of the Court.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A] **[***LEdHR3A]** [3A] **[***LEdHR4A]** [4A] **[***LEdHR5A]** [5A] **[***LEdHR6A]** [6A]This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their *First Amendment* rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds **[***600]** were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982-1983 school year totaled $ 4,668.50; revenue from sales was $ 1,166.84. The other costs associated with the newspaper -- such as supplies, textbooks, **[*263]** and a portion of the journalism teacher's salary -- were borne entirely by the Board.

The Journalism II course was taught by Robert

Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed **[**566]** the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. App. to Pet. for Cert. 38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run **[*264]** and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. [1] He informed his superiors of the decision, and they concurred.

1 The two pages deleted from the newspaper also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. Reynolds testified that he had no objection to these articles and that they were deleted only because they appeared on the same pages as the two objectionable articles.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration **[***601]** that their *First Amendment* rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no *First Amendment* violation had occurred. *607 F. Supp. 1450 (1985).*

The District Court concluded that school officials may impose restraints on students' speech in activities that are "'an integral part of the school's educational function'" -- including the publication of a school-sponsored newspaper by a journalism class -- so long as their decision has "'a substantial and reasonable basis.'" *Id., at 1466* (quoting *Frasca v. Andrews, 463 F. Supp. 1043, 1052 (EDNY 1979)).* The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." *607 F. Supp., at 1466.* The court held that Reynolds' action was also justified "to avoid the impression that [the school] endorses **[*265]** the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. *Ibid.* The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." *Id., at 1467.* Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring **[**567]** that those stories be modified to address his concerns, based on his

"reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question." *Id., at 1466.*

The Court of Appeals for the Eighth Circuit reversed. *795 F. 2d 1368 (1986).* The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," *id., at 1373,* but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." *Id., at 1372.* The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when "'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'" *Id., at 1374* (quoting *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969)).*

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." *795 F. 2d, at 1375.* School officials were entitled to censor the articles on the ground that **[*266]** they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the **[***602]** school. The court concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' *First Amendment* rights by deleting the two pages of the newspaper.

We granted certiorari, *479 U.S. 1053 (1987),* and we now reverse.

II

[*LEdHR7]** [7]Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker, supra, at 506.*They cannot be punished merely for expressing their personal views on the school premises -- whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," *393 U.S., at 512-513* -- unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Id., at 509.*

[*LEdHR8]** [8]We have nonetheless recognized that the *First Amendment* rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682 (1986),* and must be "applied in light of the special characteristics of the school environment." *Tinker, supra, at 506;* cf. *New Jersey v. T. L. O., 469 U.S. 325, 341-343 (1985).*A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser, supra, at 685,* even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner **[*267]** that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." *478 U.S., at 685-686.* We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *id., at 683,* rather than with the **[**568]** federal courts. It is in this context that respondents' *First Amendment* claims must be considered.

A

[*LEdHR1B]** [1B] **[***LEdHR9]** [9] **[***LEdHR10]** [10]We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO, 307 U.S. 496, 515* **[***603]** *(1939).* Cf. *Widmar v. Vincent, 454 U.S. 263, 267-268, n. 5 (1981).* Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47 (1983),* or by some segment of the public, such as student organizations. *Id., at 46, n. 7* (citing *Widmar* v. *Vincent*). If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of

students, teachers, and other members of the school community. *460 U.S., at 46, n. 7.* "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985).*

[*268] **[***LEdHR1C]** [1C]The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.*, at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Ibid.* Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum*." *607 F. Supp., at 1453.* For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." *Ibid.* Moreover, after **[*269]** each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that **[**569]** they had believed that **[***604]** they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." *Id., at 1456.* These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum, see *795 F. 2d, at 1372-1373*, is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." App. 22. One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "*Spectrum*, as a student-press publication, accepts all rights implied by the *First Amendment*," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those *First Amendment* rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. [2] Finally, **[*270]** that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." App. 11. A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," *Cornelius, 473 U.S., at 802*, that existed in cases in which we found public forums to have been created. See *id., at 802-803* (citing *Widmar v. Vincent, 454 U.S., at 267*; *Madison School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174, n. 6 (1976)*; *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975)).* School officials did not evince either "by policy or by

practice," *Perry Education Assn., 460 U.S., at 47*, **[***605]** any intent to open the pages of Spectrum to "indiscriminate use," *ibid.*, by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," *id., at 46*, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. *Ibid.* It is this standard, rather than our decision in *Tinker*, that governs this case.

> 2 The Statement also cited *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)*, for the proposition that "[o]nly speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore be prohibited." App. 26. This portion of the Statement does not, of course, even accurately reflect our holding in *Tinker*. Furthermore, the Statement nowhere expressly extended the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper. The dissent apparently finds as a fact that the Statement was published annually in Spectrum; however, the District Court was unable to conclude that the Statement appeared on more than one occasion. In any event, even if the Statement says what the dissent believes that it says, the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming.

B

[*LEdHR2B]** [2B]The question whether the *First Amendment* requires a school to tolerate particular student speech -- the question that we addressed in *Tinker* -- is different from the **[**570]** question whether the *First Amendment* requires a school affirmatively **[*271]** to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. 3

> 3 The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with *Papish v. University of Missouri Board of Curators, 410 U.S. 667 (1973)* (*per curiam*), which involved an off-campus "underground" newspaper that school officials merely had allowed to be sold on a state university campus.

[*LEdHR2C]** [2C] **[***LEdHR3B]** [3B]Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," *Fraser, 478 U.S., at 685*, not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," *Tinker, 393 U.S., at 509*, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. 4 A school must **[***606]** be able to set high standards for **[*272]** the student speech that is disseminated under its auspices -- standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world -- and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser, supra, at 683*, or to associate the school with any position other than

neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education, 347 U.S. 483, 493 (1954).*

4 The dissent perceives no difference between the *First Amendment* analysis applied in *Tinker* and that applied in *Fraser*. We disagree. The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly rather than on any propensity of the speech to "materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others." *393 U.S., at 513*. Indeed, the *Fraser* Court cited as "especially relevant" a portion of Justice Black's dissenting opinion in *Tinker* "'disclaim[ing] any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'" *478 U.S., at 686* (quoting *393 U.S., at 526*). Of course, Justice Black's observations are equally relevant to the instant case.

[571]** **[***LEdHR2D]** [2D] **[***LEdHR3C]** [3C] **[***LEdHR11A]** [11A] **[***LEdHR12A]** [12A]Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination **[*273]** of student expression. [5] Instead, we hold that educators do not offend the *First Amendment* by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. [6]

[*LEdHR11B]** [11B]

5 We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid "invasion of the rights of others," *393 U.S., at 513*, except where that speech could result in tort liability to the school.

[*LEdHR3D]** [3D] **[***LEdHR12B]** [12B]

6 We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds. See *Baughman v. Freienmuth, 478 F. 2d 1345 (CA4 1973)*; *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex., 462 F. 2d 960 (CA5 1972)*; *Eisner v. Stamford Board of Education, 440 F. 2d 803 (CA2 1971).*

[*LEdHR3E]** [3E] **[***LEdHR12C]** [12C]This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, *e. g., Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 208 (1982)*;*Wood v. Strickland, 420 U.S. 308, 326 (1975)*; **[***607]** *Epperson v. Arkansas, 393 U.S. 97, 104 (1968).* It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the *First Amendment* is so "directly and sharply implicate[d]," *ibid.*, as to require judicial intervention to protect students' constitutional rights. [7]

[*LEdHR12D]** [12D]

7 A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. See, *e. g., Nicholson v. Board of Education, Torrance Unified School Dist., 682 F. 2d 858 (CA9 1982)*; *Seyfried v. Walton, 668 F. 2d*

214 (CA3 1981); *Trachtman v. Anker, 563 F. 2d 512 (CA2 1977)*, cert. denied, *435 U.S. 925 (1978)*; *Frasca v. Andrews, 463 F. Supp. 1043 (EDNY 1979)*. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.

[*274] III

[*LEdHR4B]** [4B] **[***LEdHR5B]** [5B] **[***LEdHR6B]** [6B]We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

[*LEdHR4C]** [4C]The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in **[**572]** the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen **[*275]** and presumably taken home to be read by students' even younger brothers and sisters.

[*LEdHR5C]** [5C]The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent -- indeed, as one who chose "playing cards with the guys" over home and family -- was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be **[***608]** printed without deletion of the student's name. [8]

8 The reasonableness of Principal Reynolds' concerns about the two articles was further substantiated by the trial testimony of Martin Duggan, a former editorial page editor of the St. Louis Globe Democrat and a former college journalism instructor and newspaper adviser. Duggan testified that the divorce story did not meet journalistic standards of fairness and balance because the father was not given an opportunity to respond, and that the pregnancy story was not appropriate for publication in a high school newspaper because it was unduly intrusive into the privacy of the girls, their parents, and their boyfriends. The District Court found Duggan to be "an objective and independent witness" whose testimony was entitled to significant weight. *607 F. Supp. 1450, 1461 (ED Mo. 1985)*.

[*LEdHR6C]** [6C]Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent **[*276]** replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

[*LEdHR4D]** [4D] **[***LEdHR5D]** [5D] **[***LEdHR6D]** [6D]In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither

the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of *First Amendment* rights occurred. [9]

9 It is likely that the approach urged by the dissent would as a practical matter have far more deleterious consequences for the student press than does the approach that we adopt today. The dissent correctly acknowledges "[t]he State's prerogative to dissolve the student newspaper entirely." *Post*, at 287. It is likely that many public schools would do just that rather than open their newspapers to all student expression that does not threaten "materia[l] disrup[tion of] classwork" or violation of "rights that are protected by law," *post*, at 289, regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be.

[573]** The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

DISSENT BY: BRENNAN

DISSENT

[*277] [*609]** JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the *First Amendment to the United States Constitution . . . .*" *795 F. 2d 1368, 1373 (CA8 1986)*. "[A]t the beginning of each school year," *id., at 1372*, the student journalists published a Statement of Policy -- tacitly approved each year by school authorities -- announcing their expectation that "*Spectrum*, as a student-press publication, accepts all rights implied by the *First Amendment* . . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." App. 26 (quoting *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969)*). [1] The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." App. 22 (Board Policy 348.51).

1 The Court suggests that the passage quoted in the text did not "exten[d] the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper" because the passage did not expressly mention them. *Ante*, at 269, n. 2. It is hard to imagine why the Court (or anyone else) might expect a passage that applies categorically to "a student-press publication," composed almost exclusively of "news and feature articles," to mention those categories expressly. Understandably, neither court below so limited the passage.

[*278] This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles -- comprising two full pages -- of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption. *795 F. 2d, at 1371*.

In my view the principal broke more than just a

promise. He violated the *First Amendment's* prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

I

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic **[***610]** Republic. See *Brown v. Board of Education, 347 U.S. 483, 493 (1954)*. The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system . . . ." *Ambach v. Norwick, 441 U.S. 68, 77* **[**574]** *(1979)*. All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "'community values.'" *Board of Education v. Pico, 457 U.S. 853, 864 (1982)* (plurality opinion) (citation omitted).

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved **[*279]** the "daily operation of school systems" to the States and their local school boards. *Epperson v. Arkansas, 393 U.S. 97, 104 (1968)*; see *Board of Education v. Pico, supra, at 863-864*. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution. See *e. g., Edwards v. Aguillard, 482 U.S. 578 (1987)* (striking state statute that forbade teaching of evolution in public school unless accompanied by instruction on theory of "creation science"); *Board of Education v. Pico, supra* (school board may not remove books from library shelves merely because it disapproves of ideas they express); *Epperson v. Arkansas, supra* (striking state-law prohibition against teaching Darwinian theory of evolution in public school); *West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)* (public school may not compel student to salute flag); *Meyer v. Nebraska, 262 U.S. 390 (1923)* (state law prohibiting the teaching of foreign languages in public or private schools is unconstitutional).

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)*. Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better. **[*280]** **[***611]** Even the maverick who sits in class passively sporting a symbol of protest against a government policy, cf. *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)*, or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," *id., at 511*, that "strangle the free mind at its source," *West Virginia Board of Education v. Barnette, supra, at 637*. The *First Amendment* permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically **[**575]** coextensive with the rights of adults in other settings," *Fraser, supra, at 682*, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker, supra, at 506*. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell v. Connecticut,*

310 U.S. 296, 310 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id., at 309*, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker*, this Court struck the balance. We held that official censorship of student expression -- there the suspension of several students until they removed their armbands protesting the Vietnam war -- is unconstitutional unless the **[*281]** speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ." *393 U.S., at 513*. School officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id., at 508*. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id., at 509*, or an unsavory subject, *Fraser, supra, at 688-689* (BRENNAN, J., concurring in judgment), does not justify official suppression of student speech in the high school.

This Court applied the *Tinker* test just a Term ago in *Fraser, supra*, upholding an official decision to discipline a student for delivering a lewd speech in support of a student-government candidate. The Court today casts no doubt on *Tinker*'s **[***612]** vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." *Ante*, at 271. On the other hand is censorship of expression that arises in the context of "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Ibid.*

The Court does not, for it cannot, purport to discern from our precedents the distinction it creates. One could, I suppose, readily characterize the students' symbolic speech in *Tinker* as "personal expression that happens to [have] occur[red] on school premises," although *Tinker* did not even hint that the personal nature of the speech was of any (much less dispositive) relevance. But that same description could not by any stretch of the imagination fit Fraser's speech. He did not just "happen" to deliver his lewd speech to an ad hoc gathering on the playground. As the second paragraph of *Fraser* evinces, if ever a forum for student expression was "school-sponsored," Fraser's was:

[*282] "Fraser . . . delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students . . . attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a *school-sponsored* educational program in self-government." *Fraser, 478 U.S., at 677* (emphasis added).

Yet, from the first sentence of its analysis, see *id., at 680*, *Fraser* faithfully applied *Tinker*.

Nor has this Court ever intimated a distinction between personal and school-sponsored speech in any other context. Particularly telling is this Court's heavy reliance on *Tinker* in two cases of *First Amendment* infringement on state college campuses. See *Papish v. University of Missouri Board of Curators, 410 U.S. 667, 671, n. 6 (1973) (per curiam)*; *Healy v. James, 408 U.S. 169, 180, 189*, and n. 18, 191 (1972). One involved the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization, see *Papish, supra, at 667-668*, and the other involved the denial of university recognition and concomitant benefits to a political student organization, see *Healy, supra, at 174, 176, 181-182*. Tracking *Tinker*'s analysis, the Court found each act of suppression unconstitutional. In neither case did this Court suggest the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

II

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical **[***613]** interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need **[*283]** to dissociate itself from student expression. *Ante*, at 271. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

A

The Court is certainly correct that the *First Amendment* permits educators "to assure that participants learn whatever lessons the activity is designed to teach . . . ." *Ante*, at 271. That is, however, the essence of the *Tinker* test, not an excuse to abandon it. Under *Tinker*, school officials may censor only such student speech as would "materially disrup[t]" a legitimate curricular function. Manifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity -- one that "is designed to teach" something -- than when it arises in the context of a noncurricular activity. Thus, under *Tinker*, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. See *Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 544-545 (1980)* (STEVENS, J., concurring in judgment). That is not because some more stringent standard applies in the curricular context. (After all, this Court applied the same standard whether the students in *Tinker* wore their armbands to the "classroom" or the "cafeteria." *393 U.S., at 512.*) It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

I fully agree with the Court that the *First Amendment* should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices . . . ." *Ante*, at 271-272. But we need not abandon *Tinker* **[*284]** to reach that conclusion; we need only apply it. The enumerated criteria reflect the skills that the curricular newspaper "is designed to teach." The educator may, under *Tinker*, constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrup[t]" the newspaper's curricular purpose.

The same cannot be said of official censorship designed to shield the *audience* or dissociate the *sponsor* from the expression. Censorship so motivated might well serve (although, as I demonstrate *infra*, at 285-289, cannot legitimately serve) some other school purpose. But it in no way furthers **[**577]** the curricular purposes of a student *newspaper*, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

[*614]** The Court relies on bits of testimony to portray the principal's conduct as a pedagogical lesson to Journalism II students who "had not sufficiently mastered those portions of the . . . curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . ., and 'the legal, moral, and ethical restrictions imposed upon journalists . . . .'" *Ante*, at 276. In that regard, the Court attempts to justify censorship of the article on teenage pregnancy on the basis of the principal's judgment that (1) "the [pregnant] students' anonymity was not adequately protected," despite the article's use of aliases; and (2) the judgment that "the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents . . . ." *Ante*, at 274. Similarly, the Court finds in the principal's decision to censor the divorce article a journalistic lesson that the author should have given the father of one student an "opportunity to defend himself" against her charge that (in the Court's words) he "chose **[*285]** 'playing cards with the guys' over home and family . . . ." *Ante*, at 275.

But the principal never consulted the students before censoring their work. "[T]hey learned of the deletions when the paper was released . . . ." *795 F. 2d, at 1371.* Further, he explained the deletions only in the broadest of generalities. In one meeting called at the behest of seven protesting Spectrum staff members (presumably a fraction of the full class), he characterized the articles as "'too sensitive' for 'our immature audience of readers,'" *607 F. Supp. 1450, 1459 (ED Mo. 1985)*, and in a later meeting he deemed them simply "inappropriate, personal, sensitive and unsuitable for the newspaper," *ibid.* The Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible. If he did, a fact that neither the District Court nor the Court of Appeals found, the lesson was lost on all but the psychic Spectrum staffer.

B

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is "unsuitable for immature audiences."

Ante, at 271 (footnote omitted). Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to "potentially sensitive topics" (like "the particulars of teen-age sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible se[x] or conduct otherwise inconsistent with 'the shared values of a civilized social order'") through school-sponsored student activities. *Ante*, at 272 (citation omitted).

Tinker teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as "thought police" stifling discussion of all but state-approved topics and advocacy of all **[*286]** but the official position. See also *Epperson v. Arkansas, 393 U.S. 97 (1968)*; *Meyer v. Nebraska, 262 U.S. 390* **[***615]** *(1923)*. Otherwise educators could transform students into "closed-circuit recipients of only that which the State chooses to communicate," *Tinker, 393 U.S., at 511*, and cast a perverse and impermissible "pall of orthodoxy over the classroom," *Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)*. Thus, the State cannot constitutionally prohibit its high school students from recounting in the locker room "the particulars of [their] teen-age **[**578]** sexual activity," nor even from advocating "irresponsible se[x]" or other presumed abominations of "the shared values of a civilized social order." Even in its capacity as educator the State may not assume an Orwellian "guardianship of the public mind," *Thomas v. Collins, 323 U.S. 516, 545 (1945)* (Jackson, J., concurring).

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. [2] The former would constitute unabashed and unconstitutional viewpoint **[*287]** discrimination, see *Board of Education v. Pico, 457 U.S., at 878-879* (BLACKMUN, J., concurring in part and concurring in judgment), as well as an impermissible infringement of the students' "'right to receive information and ideas,'" *id., at 867* (plurality opinion) (citations omitted); see *First National Bank v. Bellotti, 435 U.S. 765, 783 (1978)*. [3] Just as a school board may not purge its state-funded library of all books that "'offen[d] [its] social, political and moral tastes,'" *457 U.S., at 858-859* (plurality opinion) (citation omitted), school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse **[***616]** entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

2 The Court quotes language in *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)*, for the proposition that "'[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.'" *Ante*, at 267 (quoting *478 U.S., at 683*). As the discussion immediately preceding that quotation makes clear, however, the Court was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*. See, *e. g., Fraser, 478 U.S., at 683* ("[T]he 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others"). In fact, the *Fraser* Court coupled its first mention of "society's . . . interest in teaching students the boundaries of *socially appropriate behavior*," with an acknowledgment of "[t]he undoubted freedom to advocate unpopular and controversial views in schools and *classrooms*," *id., at 681* (emphasis added). See also *id., at 689* (BRENNAN, J., concurring in judgment) ("Nor does this case involve an attempt by school officials to ban written materials they consider 'inappropriate' for high school students" (citation omitted)).

3 Petitioners themselves concede that "'[c]ontrol over access'" to Spectrum is permissible only if "'the distinctions drawn . . . are viewpoint neutral.'" Brief for Petitioners 32 (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 806 (1985)*).

Official censorship of student speech on the ground that it addresses "potentially sensitive topics" is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, "potential

topic sensitivity" is a vaporous nonstandard -- like "'public welfare, peace, safety, health, decency, good order, morals or convenience,'" *Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969)*, or "'general welfare of citizens,'" *Staub v. Baxley, 355 U.S. 313, 322 (1958)* -- that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not **[*288]** object. In part because of those dangers, this Court has consistently condemned any scheme allowing a state official boundless **[**579]** discretion in licensing speech from a particular forum. See, *e. g., Shuttlesworth v. Birmingham, supra, at 150-151,* and n. 2; *Cox v. Louisiana, 379 U.S. 536, 557-558 (1965)*; *Staub v. Baxley, supra, at 322-324.*

The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was the potential sensitivity of "teenage sexual activity." *Ante*, at 272. Yet the District Court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topi[c] in *Spectrum*." *607 F. Supp., at 1467.* That much is also clear from the same principal's approval of the "squeal law" article on the same page, dealing forthrightly with "teenage sexuality," "the use of contraceptives by teenagers," and "teenage pregnancy," App. 4-5. If topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable. It is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate "irresponsible sex." See *ante*, at 272.

C

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." *Ante*, at 271. Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the armbands in *Tinker*, "happens to occur on the school premises," *ante*, at 271. Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood **[*289]** of such attribution, and that state educators may therefore have a legitimate interest **[***617]** in dissociating themselves from student speech.

But "'[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Keyishian v. Board of Regents, 385 U.S., at 602* (quoting *Shelton v. Tucker, 364 U.S. 479, 488 (1960)).* Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that "[a]ll . . . editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," App. 26; or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

III

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup[tion of] classwork," *Tinker, 393 U.S., at 513.* Nor did the censorship fall within the category that *Tinker* described as necessary to prevent student expression from "inva[ding] the rights of others," *ibid.* If that term is to have any content, it must be limited to rights that are protected by law. "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," *795 F. 2d, at 1376*, a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated **[**580]** fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression." **[*290]** *Tinker, supra, at 508.* And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal. See *795 F. 2d, at 1375-1376.*

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the

brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools" *Speiser v. Randall, 357 U.S. 513, 525 (1958)*; see *Keyishian v. Board of Regents, supra, at 602*, the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

[*618]** IV

The Court opens its analysis in this case by purporting to reaffirm *Tinker*'s time-tested proposition that public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 266 (quoting *Tinker, supra, at 506*). That is an ironic introduction to an opinion that denudes high school students of much of the *First Amendment* protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," *Board of Education v. Pico, 457 U.S., at 880* (BLACKMUN, J., concurring in part and concurring in judgment), and "that our Constitution is a living reality, not parchment preserved under glass," *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex., 462 F. 2d 960, 972 (CA5* **[*291]** *1972)*, the Court today "teach[es] youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette, 319 U.S., at 637*. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

PLEASANT GROVE CITY, UTAH, et al., Petitioners v. SUMMUM

No. 07-665

SUPREME COURT OF THE UNITED STATES

555 U.S. 460; 129 S. Ct. 1125; 172 L. Ed. 2d 853; 2009 U.S. LEXIS 1636; 77 U.S.L.W. 4136; 21 Fla. L. Weekly Fed. S 648

November 12, 2008, Argued
February 25, 2009, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Summum v. Pleasant Grove City, 483 F.3d 1044, 2007 U.S. App. LEXIS 8715 (10th Cir., 2007)

DISPOSITION: Reversed.

SYLLABUS

[1126]** **[*460]** Pioneer Park (Park), a public park in petitioner Pleasant Grove City (City), has at least 11 permanent, privately donated displays, including a Ten Commandments monument. In rejecting the request of respondent Summum, a religious organization, **[**1127]** to erect a monument containing the Seven Aphorisms of Summum, the City explained that it limited Park monuments to those either directly related to the City's history or donated by groups with longstanding community ties. After the City put that policy and other criteria into writing, respondent renewed its request, but did not describe the monument's historical significance or respondent's connection to the community. The City rejected the request, and respondent filed suit, claiming that the City and petitioner officials had violated the *First Amendment's* Free Speech Clause by accepting the Ten Commandments monument but rejecting respondent's proposed monument. The District Court denied respondent's preliminary injunction request, but the Tenth Circuit reversed. Noting that it had previously found the Ten Commandments monument to be private rather than government speech and that public parks have traditionally been regarded as public forums, the court held that, because the exclusion of the monument was unlikely to survive strict scrutiny, the City was required to erect it immediately.

Held:

The placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the *Free Speech Clause*. Pp 4-18.

(a) Because that Clause restricts government regulation of private speech but not government speech, whether petitioners were engaging in their own expressive conduct or providing a forum for private speech determines which precedents govern here. Pp 4-7.

(1) A government entity "is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700*, and to select the views that it wants to express, see, *e.g., Rust v. Sullivan, 500 U.S. 173, 194, 111 S. Ct. 1759, 114 L. Ed. 2d 233*. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. See *Johanns v. Livestock Marketing Assn., 544 U.S. 550, 562, 125 S. Ct. 2055, 161 L. Ed. 2d 896*. This does not mean that there are no restraints on government speech. For example, government speech must comport with the *Establishment Clause*. **[*461]** In addition, public officials' involvement in advocacy may be limited by law, regulation, or practice; and a government entity is ultimately "accountable to the electorate and the political process for its advocacy," *Board of Regents of Univ. of*

Wis. System v. Southworth, 529 U.S. 217, 235, 120 S. Ct. 1346, 146 L. Ed. 2d 193. Pp 4-6.

(2) In contrast, government entities are strictly limited in their ability to regulate private speech in "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567.* Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794*, but content-based restrictions must satisfy strict scrutiny, *i.e.*, they must be narrowly tailored to serve a **[***858]** compelling government interest, see *Cornelius, supra, at 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567.* Restrictions based on viewpoint are also prohibited. *Carey v. Brown, 447 U.S. 455, 463, 100 S. Ct. 2286, 65 L. Ed. 2d 263.* Government restrictions on speech in a "designated public forum" are subject to the same strict scrutiny as restrictions in a traditional public forum. *Cornelius, supra, at 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567.* And where government creates a forum that is limited to use by certain groups or dedicated to the discussion of certain subjects, *Perry Ed. Assn., supra, at 46, n. 7, 103 S. Ct. 948, 74 L. Ed. 2d 794*, it may impose reasonable and viewpoint-neutral restrictions, see *Good News Club* **[**1128]** *v. Milford Central School, 533 U.S. 98, 106-107, 121 S. Ct. 2093, 150 L. Ed. 2d 151.* Pp 6-7.

(b) Permanent monuments displayed on public property typically represent government speech. Governments have long used monuments to speak to the public. Thus, a government-commissioned and government-financed monument placed on public land constitutes government speech. So, too, are privately financed and donated monuments that the government accepts for public display on government land. While government entities regularly accept privately funded or donated monuments, their general practice has been one of selective receptivity. Because city parks play an important role in defining the identity that a city projects to its residents and the outside world, cities take care in accepting donated monuments, selecting those that portray what the government decisionmakers view as appropriate for the place in question, based on esthetics, history, and local culture. The accepted monuments are meant to convey and have the effect of conveying a government message and thus constitute government speech. Pp 7-10.

(c) Here, the Park's monuments clearly represent government speech. Although many were donated in completed form by private entities, the City has "effectively controlled" their messages by exercising "final approval authority" over their selection. *Johanns, supra, at 560-561, 125 S. Ct. 2055, 161 L. Ed. 2d 896.* The City has selected monuments that present the image that the City wishes to project to Park visitors; it has taken ownership of most of the **[*462]** monuments in the Park, including the Ten Commandments monument; and it has now expressly set out selection criteria. P. 10.

(d) Respondent's legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain viewpoints does not mean that a government entity should be required to embrace publicly a privately donated monument's "message" in order to escape *Free Speech Clause* restrictions. A city engages in expressive conduct by accepting and displaying a privately donated monument, but it does not necessarily endorse the specific meaning that any particular donor sees in the monument. A government's message may be altered by the subsequent addition of other monuments in the same vicinity. It may also change over time. Pp 10-15.

(e) "[P]ublic forum principles . . . are out of place in the context of this case." *United States v. American Library Assn., Inc., 539 U.S. 194, 205, 123 S. Ct. 2297, 156 L. Ed. 2d 221.* The forum doctrine applies where a government property or program is capable of accommodating a large number of public speakers without defeating the essential function of the land or program, but public parks can **[***859]** accommodate only a limited number of permanent monuments. If governments must maintain viewpoint neutrality in selecting donated monuments, they must either prepare for cluttered parks or face pressure to remove longstanding and cherished monuments. Were public parks considered traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And if forum analysis would lead almost inexorably to closing of the forum, forum analysis is out of place. *Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650*, distinguished. Pp 15-18.

483 F.3d 1044, reversed.

COUNSEL: Jay A. Sekulow argued the cause for

petitioners. **Daryl Joseffer** argued the cause for the United States, as amicus curiae, by special leave of court. **Pamela Harris** argued the cause for respondent.

JUDGES: Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed a concurring opinion, in which Ginsburg, J., joined, post, p. ___. Scalia, J., filed a concurring opinion, in which Thomas, J., joined, post, p. ___. Breyer, J., filed a concurring opinion, post, p. ___. Souter, J., filed an opinion concurring in the judgment, post, p. ___.

OPINION BY: Alito

OPINION

[1129]** **[*464]** Justice **Alito** delivered the opinion of the Court.

This case presents the question whether the Free Speech Clause of the *First Amendment* entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that **[***LEdHR1]** [1] although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the *Free Speech Clause*.

I

A

Pioneer Park (or Park) is a 2.5-acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains [15 permanent displays,] at least 11 of which were donated by private groups or individuals. **[*465]** These include a historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM"[1] and be similar **[**1130]** in size and nature to the Ten Commandments monument. **[***860]** App. 57, 59. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community." *Id.*, at 61. The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

1 Respondent's brief describes the church and the Seven Aphorisms as follows: "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' See The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnostici sm.shtml (visited Aug. 15, 2008). "Central to Summum religious belief and practice are the Seven Principles of Creation (the 'Seven Aphorisms'). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. See The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencomma ndments.shtml (visited Aug. 15, 2008)." Brief for Respondent 1-2.

[*466] In May 2005, respondent's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community.

The city council rejected this request.

B

In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the *First Amendment* by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park. After the District Court denied Summum's preliminary injunction request, *No. 2:05CV00638, 2006 U.S. Dist. LEXIS 87399, 2006 WL 3421838 (D Utah, Nov. 22, 2006)*, respondent appealed, pressing solely its free speech claim.

A panel of the Tenth Circuit reversed. *483 F.3d 1044 (2007)*. The panel noted that it had previously found the Ten Commandments monument to be private rather than government speech. See *Summum v. Ogden, 297 F.3d 995 (2002)*. Noting that public parks have traditionally been regarded as public forums, the panel held that the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means. See *483 F.3d at 1054*. The panel then concluded that the exclusion of respondent's monument was unlikely to survive this strict scrutiny, and the panel therefore held that the City was required to erect Summum's monument immediately.

The Tenth Circuit denied the City's petition for rehearing en banc by an equally divided vote. *499 F.3d 1170 (2007)*. Judge Lucero dissented, arguing that the Park was not a traditional public forum for the purpose of displaying monuments. *Id., at 1171*. Judge McConnell also dissented, contending **[*467]** that the monuments in the Park constitute government speech. *Id., at 1174*.

We granted certiorari, *552 U.S. 1294*, **[***861]** *128 S. Ct. 1737, 170 L. Ed. 2d 537 (2008)*, and now reverse.

[1131]** II

No prior decision of this Court has addressed the application of the *Free Speech Clause* to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?

A

If petitioners were engaging in their own expressive conduct, then the *Free Speech Clause* has no application. **[***LEdHR2] [2]*The Free Speech Clause*** restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn., 544 U.S. 550, 553, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005)* ("[T]he Government's own speech . . . is exempt from *First Amendment* scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 139, n. 7, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973)* (Stewart, J., concurring) ("Government is not restrained by the *First Amendment* from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000)*. "[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ.* **[*468]** *of Va., 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*, and to select the views that it wants to express. See *Rust v. Sullivan, 500 U.S. 173, 194, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*; *National Endowment for Arts v. Finley, 524 U.S. 569, 598, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998)* (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of Cal., 496 U.S. 1, 12-13, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990)*. See also *Johanns, 544 U.S., at 574, 125 S. Ct. 2055, 161 L. Ed. 2d 896* (Souter, J., dissenting) ("To govern, government has to say

something, and a *First Amendment* heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question" (footnote omitted)).

[*LEdHR3]** [3] A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. See *id., at 562, 125 S. Ct. 2055, 161 L. Ed. 2d 896* (opinion of the Court) (where the government controls **[***862]** the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger, supra, at 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700* (a government entity may "regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message").

This does not mean that there are no restraints on government speech. For **[**1132]** example, government speech must comport with the *Establishment Clause*. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate and the political process for its advocacy." *Southworth, 529 U.S., at 235, 120 S. Ct. 1346, 146 L. Ed. 2d 193*. "If the **[*469]** citizenry objects, newly elected officials later could espouse some different or contrary position." *Ibid.*

B

[*LEdHR4]** [4] While government speech is not restricted by the *Free Speech Clause*, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)* (quoting *Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)* (opinion of Roberts, J.)). In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)*. Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn., supra, at 45, 103 S. Ct. 948, 74 L. Ed. 2d 794*, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, see *Cornelius, supra, at 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567*, and restrictions based on viewpoint are prohibited, see *Carey v. Brown, 447 U.S. 455, 463, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980)*.

[*LEdHR5]** [5] With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum. We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. See *Cornelius, 473 U.S., at 802, 105 S. Ct. 3439, 87 L. Ed. 2d 567*. Government **[*470]** restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. *Id., at 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567*.

The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Perry Ed. Assn., supra, at 46, n. 7, 103 S. Ct. 948,* **[***863]** *74 L. Ed. 2d 794*. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral. See *Good News Club v. Milford Central School, 533 U.S. 98, 106-107, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001)*.

III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. **[***LEdHR6]** [6] Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient **[**1133]** times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and

power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that **[***LedHR7]** [7] a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government **[*471]** accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely--and reasonably--interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. See, *e.g.*, App. to Brief for International Municipal Lawyers Association as *Amicus Curiae* 15a-29a (hereinafter IMLA Brief) (listing examples); Brief for American Legion et al. as *Amici Curiae* 7, and n 2 (same). By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own. **[***864]**

But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity. An example discussed by the city of New York as *amicus curiae* is illustrative. In the wake of the controversy generated in 1876 when the city rejected the donor's **[*472]** proposed placement of a donated monument to honor Daniel Webster, the city adopted rules governing the acceptance of artwork for permanent placement in city parks, requiring, among other things, that "any proposed gift of art had to be viewed either in its finished condition or as a model before acceptance." Brief for City of New York as *Amicus Curiae* 4-5 (hereinafter NYC Brief). Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals." IMLA Brief 21.

Public parks are often closely identified in the public mind with the government unit that owns the land. City parks--ranging **[**1134]** from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City--commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV

A

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that **[*473]** the City ever opened up the Park for the placement of whatever permanent

monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. *Johanns, 544 U.S., at 560-561, 125 S. Ct. 2055, 161 L. Ed. 2d 896.* The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.

B

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing **[***865]** "the message" that the monument conveys. See Brief for Respondent 33-34, 57.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape *Free Speech Clause* restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

In this case, for example, although respondent argues that Pleasant Grove City has not adequately "controll[ed] the message," *id.*, at 31, of the Ten Commandments monument, the City took ownership of that monument and put it on permanent **[*474]** display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf. And the **[**1135]** City has made no effort to abridge the traditional free speech rights--the right to speak, distribute leaflets, etc.--that may be exercised by respondent and others in Pioneer Park.

What respondent demands, however, is that the City "adopt" or "embrace" "the message" that it associates with the monument. *Id.*, at 33-34, 57. Respondent seems to think that a monument can convey only one "message"--which is, presumably, the message intended by the donor--and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct.

This argument fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one like "'Beef. It's What's for Dinner.'" *Johanns, supra, at 554, 125 S. Ct. 2055, 161 L. Ed. 2d 896.* Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? See NYC Brief 18; App. to *id.*, at A5. Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic **[*475]** and may "imagine" a world without religion, countries, possessions, greed, or hunger.[2] **[***866]**

2 The lyrics are as follows: "Imagine there's no heaven It's easy if you try No hell below us Above us only sky Imagine all the people Living for today . . . "Imagine there's no countries It isn't hard to do Nothing to kill or die for And no religion too Imagine all the people Living life in peace . . . "You may say I'm a dreamer But I'm not the only one I hope someday you'll join us And the world will be as one "Imagine no possessions I wonder if you can No need for greed or hunger A brotherhood of man Imagine all the people Sharing all the world . . . "You may say I'm a dreamer But I'm not the only one I hope someday you'll join us And the world will live as one." J. Lennon, Imagine, on Imagine (Apple Records 1971).

Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas?[3]

3 See IMLA Brief 6-7.

These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. Consider, for example, **[*476]** the statue of Pancho Villa that was given to the city of Tucson, Arizona, in 1981 by the Government of Mexico with, according to a Tucson publication, "a wry sense of irony."[4] Does this statue commemorate a "revolutionary leader who advocated for **[**1136]** agrarian reform and the poor" or "a violent bandit"? IMLA Brief 13.

4 The Presidio Trail: A Historical Walking Tour of Downtown Tucson, online at http://www.visittucson.org/includes/media/docs/DowntownTour.pdf (as visited Feb. 24, 2009, and available in Clerk of Court's case file).

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.[5] By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately **[***867]** donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance.[6]

5 Museum collections illustrate this phenomenon. Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."

6 For example, the Vietnam Veterans Memorial Fund is a private organization that obtained funding from over 650,000 donors for the construction of the memorial itself. These donors expressed a wide range of personal sentiments in contributing money for the memorial. See, *e.g.*, J. Scruggs & J. Swerdlow, To Heal a Nation: The Vietnam Veterans Memorial 23-28, 159 (1985).

[*LEdHR8]** [8] By accepting such a monument, a government entity does not necessarily endorse **[*477]** the specific meaning that any particular donor sees in the monument.

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity. For example, following controversy over the original design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of a flagstaff and bronze Three Soldiers statue, which many believed changed the overall effect of the memorial. See, *e.g.*, J. Mayo, War Memorials as Political Landscape: The American Experience and Beyond 202-203, 205 (1988); K. Hass, Carried to the Wall: American Memory and the Vietnam Veterans Memorial 15-18 (1998).

The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes." Mayo, *supra*, at 8-9.

A striking example of how the interpretation of a monument can evolve is provided by one of the most famous and beloved public monuments in the United States, the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. See J. Res. 6, 44th Cong., 2d Sess. (1877), 19 Stat. 410 (accepting the statue as an "expressive and felicitous memorial of the sympathy of the citizens of our sister Republic"). At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the widespread influence of American ideals. See Inauguration of the Statue of Liberty

Enlightening the World 30 (1887). Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom. See Public Papers of the Presidents, **[**1137]** Ronald Reagan, Vol. 2, July 3, 1986, pp 918-919 (1989), Remarks at the Opening Ceremonies of the Statue of Liberty Centennial **[*478]** Celebration in New York, New York; J. Higham, The Transformation of the Statue of Liberty, in Send These To Me 74-80 (rev. ed. 1984).

C

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." *United States v. American Library Assn., Inc., 539 U.S. 194, 205, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003)* (plurality opinion). **[***LEdHR9]** [9] The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating **[***868]** a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. See *Cornelius, 473 U.S., at 804-805, 105 S. Ct. 3439, 87 L. Ed. 2d 567.* A public university's student activity fund can provide money for many campus activities. See *Rosenberger, 515 U.S., at 825, 115 S. Ct. 2510, 132 L. Ed. 2d 700.* A public university's buildings may offer meeting space for hundreds of student groups. See *Widmar v. Vincent, 454 U.S. 263, 274-275, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).* A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators. See *Perry Ed. Assn., 460 U.S., at 39, 46-47, 103 S. Ct. 948, 74 L. Ed. 2d 794.* See also *Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. 666, 680-681, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998)* (noting that allowing any candidate to participate in a televised political debate would be burdensome on "logistical grounds" and "would result in less speech, not more").

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, "'time out of mind, . . . for purposes of assembly, communicating **[*479]** thoughts between citizens, and discussing public questions,'" *Perry Ed. Assn., supra, at 45, 103 S. Ct. 948, 74 L. Ed. 2d 794*(opinion of Roberts, J.) (quoting *Hague, 307 U.S., at 515, 59 S. Ct. 954, 83 L. Ed. 1423*), but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments," *499 F.3d at 1173* (Lucero, J., dissenting from denial of rehearing en banc).

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators--often, for all who want to speak--but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." Brief for Respondent 14. On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (1) declining France's offer or (2) accepting **[**1138]** the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

While respondent and some of its *amici* deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of **[***869]** clutter" or face the pressure to remove longstanding and cherished monuments. **[*480]** See *499 F.3d at 1175* (McConnell, J., dissenting from denial of rehearing en banc). Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a

donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic)[7] may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And **[***LEdHR10]** [10] where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

7 See NYC Brief 2; App. to Brief for American Catholic Lawyers Association as *Amicus Curiae* 1a-10.

Respondent compares the present case to *Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)*, but that case involved a very different situation--a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah. See *id., at 758, 115 S. Ct. 2440, 132 L. Ed. 2d 650*. Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument--for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But **[***LEdHR11]** [11] as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

[*481] V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the *Free Speech Clause*, and the Court of Appeals erred in holding otherwise. We therefore reverse.

It is so ordered.

CONCUR BY: Stevens; Scalia; Breyer; Souter

CONCUR

Justice **Stevens,** with whom Justice **Ginsburg** joins, concurring.

This case involves a property owner's rejection of an offer to place a permanent display on its land. While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of **[**1139]** the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message. See *Capitol Square Review and Advisory Bd. v.* **[***870]** *Pinette, 515 U.S. 753, 801-802, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)* (Stevens, J., dissenting).

To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. See, *e.g., Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)*; *Johanns v. Livestock Marketing Assn., 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005)*; *Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*. The Court's opinion in this case signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions. Unlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech. Cf. *Garcetti, 547 U.S., at 438, 126 S. Ct. 1951, 164 L. Ed. 2d 689* (Souter, J., dissenting); *Rust, 500 U.S., at 212, 111 S. Ct. 1759, 114 L. Ed. 2d 233* (Blackmun, J., dissenting). Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government **[*482]** will be able to avoid political accountability for the views that it endorses or expresses through this means. Cf. *Johanns, 544 U.S., at 571-572, 125 S. Ct. 2055, 161 L. Ed. 2d 896* (Souter, J., dissenting). Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. For even if the *Free Speech Clause* neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and *Equal Protection Clauses*. Together with the checks imposed by our democratic processes,

these constitutional safeguards ensure that the effect of today's decision will be limited.

Justice **Scalia,** with whom Justice **Thomas** joins, concurring.

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the *First Amendment.* I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the *First Amendment's Establishment Clause*: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State," *Reynolds v. United States, 98 U.S. 145, 164, 25 L. Ed. 244 (1879)*; respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently "adopted" its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that "might of course raise *Establishment Clause* issues." Brief for Respondent 34, n 11.

The city ought not fear that today's victory has propelled it from the *Free Speech Clause* frying pan into the *Establishment Clause* fire. Contrary to respondent's intimations, **[*483]** there are very good reasons to be confident that the park displays do not violate *any* part of the *First Amendment.*

In *Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005)*, this Court upheld against *Establishment Clause* **[***871]** challenge a virtually identical Ten Commandments monument, donated by **[**1140]** the very same organization (the Fraternal Order of Eagles), which was displayed on the grounds surrounding the Texas State Capitol. Nothing in that decision suggested that the outcome turned on a finding that the monument was only "private" speech. To the contrary, all the Justices agreed that government speech was at issue, but the *Establishment Clause* argument was nonetheless rejected. For the plurality, that was because the Ten Commandments "have an undeniable historical meaning" in addition to their "religious significance," *id., at 690, 125 S. Ct. 2854, 162 L. Ed. 2d 607* (opinion of Rehnquist, C. J.). Justice Breyer, concurring in the judgment, agreed that the monument conveyed a permissible secular message, as evidenced by its location in a park that contained multiple monuments and historical markers; by the fact that it had been donated by the Eagles "as part of that organization's efforts to combat juvenile delinquency"; and by the length of time (40 years) for which the monument had gone unchallenged. *Id., at 701-703, 125 S. Ct. 2854, 162 L. Ed. 2d 607.* See also *id., at 739-740, 125 S. Ct. 2854, 162 L. Ed. 2d 607* (Souter, J., dissenting).

Even accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*, there is little basis to distinguish the monument in this case: Pioneer Park includes "15 permanent displays," *ante, at 464, 172 L. Ed. 2d, at 859* (Opinion of the Court); it was donated by the Eagles as part of its national effort to combat juvenile delinquency, Brief for Respondent 3; and it was erected in 1971, *ibid.*, which means it is approaching its (momentous!) 40th anniversary.

The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary--and, yes, even its Ten Commandments monument--without fear that they are complicit in an establishment of religion.

[*484] Justice **Breyer,** concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were Pleasant Grove City (City) to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say, solely on political grounds, its action might well violate the *First Amendment.*

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye toward their purposes--lest we turn "free speech" doctrine into a jurisprudence of labels. Cf. *United States v. Kokinda, 497 U.S. 720, 740-743, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990)* (Brennan, J., dissenting). Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective. See, *e.g., Ysursa v. Pocatello Ed. Assn., ante, at 1-4, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 2009 U.S. LEXIS 1632* (Breyer, J., concurring in part and

dissenting in part); *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 404, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)* (Breyer, J., concurring). **[***872]**

Were we to do so here, we would find--for reasons that the Court sets forth--that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent **[**1141]** monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. To the contrary, cities use park space to further a variety of recreational, historical, educational, esthetic, and other civic interests. To reserve to the City the power to pick and choose **[*485]** among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate. Analyzed either way, as "government speech" or as a proportionate restriction on Summum's expression, the City's action here is lawful.

Justice **Souter,** concurring in the judgment.

I agree with the Court that the Ten Commandments monument is government speech, that is, an expression of a government's position on the moral and religious issues raised by the subject of the monument. See *Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000)* (noting government speech may "promote [government's] own policies or . . . advance a particular idea"). And although the government should lose when the character of the speech is at issue and its governmental nature has not been made clear, see *Johanns v. Livestock Marketing Assn., 544 U.S. 550, 577, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005)* (Souter, J., dissenting), I also agree with the Court that the city need not satisfy the particular formality urged by Summum as a condition of recognizing that the expression here falls within the public category. I have qualms, however, about accepting the position that public monuments are government speech categorically. See *ante, at 470-471, 172 L. Ed. 2d, at 863* ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land").

Because the government speech doctrine, as Justice Stevens notes, *ante, at 481, 172 L. Ed. 2d, at 869-870* (concurring opinion), is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored. Even though, for example, *Establishment Clause* issues have been neither raised nor briefed before us, there **[*486]** is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the *Establishment Clause*, see *ante, at 482, 172 L. Ed. 2d, at 870* (Scalia, J., concurring). The interaction between the "government speech doctrine" and *Establishment Clause* principles has not, however, begun to be worked out.

The case shows that it may not be easy to work out. After today's decision, **[***873]** whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the *Establishment Clause* will behoove it to take care to avoid the appearance of a flatout establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking **[**1142]** in its own right simply by maintaining the monuments.

If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further *Establishment Clause* prohibition would surface, the bar against preferring some religious speakers over others. See *Wallace v. Jaffree, 472 U.S. 38, 113, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)* (Rehnquist, J., dissenting) ("The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others"). But the government could well argue, as a development of government speech

doctrine, that when it expresses its own views, it is free of the *Establishment Clause*'s stricture against discriminating among religious **[*487]** sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Whether that view turns out to be sound is more than I can say at this point. It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of *Establishment Clause* analysis, and this case is not an occasion to speculate. It is an occasion, however, to try to keep the inevitable issues open, and as simple as they can be. One way to do that is to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the *Establishment Clause* cases. See, *e.g., County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 630, 635-636, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989)* (O'Connor, J., concurring in part and concurring in judgment). The adoption of it would thus serve coherence within *Establishment Clause* law, and it would make sense of our common understanding that **[***874]** some monuments on public land display religious symbolism that clearly does not express a government's chosen views.

Application of this observer test provides the reason I find the monument here to be government expression.

SANTA FE INDEPENDENT SCHOOL DISTRICT v. JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, ET AL.

No. 99-62

SUPREME COURT OF THE UNITED STATES

530 U.S. 290; 120 S. Ct. 2266; 147 L. Ed. 2d 295; 2000 U.S. LEXIS 4154; 68 U.S.L.W. 4525; 2000 Cal. Daily Op. Service 4865; 2000 Daily Journal DAR 6477; 2000 Colo. J. C.A.R. 3558; 13 Fla. L. Weekly Fed. S 425

March 29, 2000, Argued
June 19, 2000, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: *168 F.3d 806*, affirmed.

SYLLABUS

Prior to 1995, a student elected as Santa Fe High School's student council chaplain delivered a prayer over the public address system before each home varsity football game. Respondents, Mormon and Catholic students or alumni and their mothers, filed a suit challenging this practice and others under the *Establishment Clause of the First Amendment*. While the suit was pending, petitioner school district (District) adopted a different policy, which authorizes two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students held elections authorizing such prayers and selecting a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian, nonproselytizing prayer. The Fifth Circuit held that, even as modified by the District Court, the football prayer policy was invalid.

Held: The District's policy permitting student-led, student-initiated prayer at football games violates the *Establishment Clause*. Pp. 9-26.

(a) The Court's analysis is guided by the principles endorsed in *Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649*. There, in concluding that a prayer delivered by a rabbi at a graduation ceremony violated the *Establishment Clause*, the Court held that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so, *id. at 587*. The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here -- on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer -- is not properly characterized as "private" speech. Although the District relies heavily on this Court's cases addressing public forums, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510*, it is clear that the District's pregame ceremony is not the type of forum discussed in such cases. The District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally, see, *e.g., Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 270, 98 L. Ed. 2d 592, 108 S. Ct. 562*, but, rather, allows only one student, the same student for the entire season, to give the invocation, which is subject to particular regulations that confine the content and topic of the student's message. The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. See *Board of Regents of Univ. of*

Wis. System v. Southworth, 529 U.S. 217, , 146 L. Ed. 2d 193, 120 S. Ct. 1346. Moreover, the District has failed to divorce itself from the invocations' religious content. The policy involves both perceived and actual endorsement of religion, see *Lee, 505 U.S. at 590*, declaring that the student elections take place because the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "upon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemnizing the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an appeal for divine assistance and, as used in the past at Santa Fe High School, has always entailed a focused religious message. A conclusion that the message is not "private speech" is also established by factors beyond the policy's text, including the official setting in which the invocation is delivered, see, *e.g., Wallace,* 472 U.S, at 73, 76, by the policy's sham secular purposes, see *id.* at 75, and by its history, which indicates that the District intended to preserve its long-sanctioned practice of prayer before football games, see *Lee, 505 U.S. at 596.* Pp. 9-18.

(b) The Court rejects the District's argument that its policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. The first part of this argument -- that there is no impermissible government coercion because the pregame messages are the product of student choices -- fails for the reasons discussed above explaining why the mechanism of the dual elections and student speaker do not turn public speech into private speech. The issue resolved in the first election was whether a student would deliver prayer at varsity football games, and the controversy in this case demonstrates that the students' views are not unanimous on that issue. One of the *Establishment Clause*'s purposes is to remove debate over this kind of issue from governmental supervision or control. See *Lee, 505 U.S. at 589.* Although the ultimate choice of student speaker is attributable to the students, the District's decision to hold the constitutionally problematic election is clearly a choice attributable to the State, *id,* at 587. The second part of the District's argument -- that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary -- is unpersuasive. For some students, such as cheerleaders, members of the band, and the team members themselves, attendance at football games is mandated, sometimes for class credit. The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football. *Id. at 593.* The Constitution demands that schools not force on students the difficult choice between whether to attend these games or to risk facing a personally offensive religious ritual. See *id, at 596.* Pp. 18-21.

(c) The Court also rejects the District's argument that respondents' facial challenge to the policy necessarily must fail because it is premature: No invocation has as yet been delivered under the policy. This argument assumes that the Court is concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that the Court keep in mind the myriad, subtle ways in which *Establishment Clause* values can be eroded, *Lynch v. Donnelly, 465 U.S. 668, 694, 79 L. Ed. 2d 604, 104 S. Ct. 1355,* and guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. See, *e.g., Bowen v. Kendrick, 487 U.S. 589, 602, 101 L. Ed. 2d 520, 108 S. Ct. 2562; Lemon v. Kurtzman, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105.* As discussed above, the policy's text and the circumstances surrounding its enactment reveal that it has such a purpose. Another constitutional violation warranting the Court's attention is the District's implementation of an electoral process that subjects the issue of prayer to a majoritarian vote. Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Cf. *Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 146 L. Ed. 2d 193, 120 S. Ct. 1346.* For the foregoing reasons, the policy is invalid on its face. Pp. 21-26.

168 F.3d 806, affirmed.

COUNSEL: Jay A. Sekulow argued the cause for petitioner.

John Cornyn argued the cause for Texas, et al., as amici curiae, by special leave of court.

Anthony P. Griffin argued the cause for respondents.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

OPINION BY: STEVENS

OPINION

[*294] **[**2271]** **[***305]** JUSTICE STEVENS delivered the opinion of the Court.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A]Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the *Establishment Clause of the First Amendment*. While these proceedings were pending in the District Court, the school district adopted a different **[***306]** policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

I

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the State. The District includes the Santa Fe High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment. [1]

1 A decision, the Fifth Circuit Court of Appeals noted, that many District officials "apparently neither agreed with nor particularly respected." *168 F.3d 806, 809, n. 1 (CA5 1999)*. About a month after the complaint was filed, the District Court entered an order that provided, in part:

> "Any further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." App. 34-35.

[*295] Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the *Establishment Clause* at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, **[**2272]** [2] and to deliver overtly Christian prayers over the public address system at home football games.

2 At the 1994 graduation ceremony the senior class president delivered this invocation:

> "Please bow your heads.

"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray." *Id.* at 19.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. [3] [***307] With respect [*296] to the impending graduation, the order provided that "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the prayer is non-proselytizing." App. 32.

3 For example, it prohibited school officials from endorsing or participating in the baccalaureate ceremony sponsored by the Santa Fe Ministerial Alliance, and ordered the District to establish policies to deal with

"manifest *First Amendment* infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental." *Id.* at 34.

In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

"'The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing [*297] their graduation ceremonies.'" *168 F.3d 806, 811 (CA5 1999)* (emphasis deleted).

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." App. 52. In a second vote the class elected two seniors to deliver the invocation and benediction. [4]

4 The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen." *Id.* at 53. The student benediction was similar in content and closed: "Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways. Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen." *Id.* at 54.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian [**2273] and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at

Football Games," was similar to the July policy for graduations. It also authorized two student **[***308]** elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytising," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games . . . . The students chose to allow a **[*298]** student to say a prayer at football games." *Id.* at 65. A week later, in a separate election, they selected a student "to deliver the prayer at varsity football games." *Id.* at 66.

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations." [5] It is the validity of that policy that is before us. [6]

> 5 Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.
>
> 6 It provides:
>
> "STUDENT ACTIVITIES:
>
> "PRE-GAME CEREMONIES AT FOOTBALL GAMES
>
> "The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> "Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.
>
> "If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.
>
> "The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> "Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.* at 104-105.

[*299] The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992)*, it held that the school's "action must not 'coerce anyone to support or participate in' a religious exercise." App. to Pet. for Cert. E7. Applying that test, it concluded that the graduation prayers appealed "to distinctively Christian beliefs," [7] and that delivering a **[**2274]** prayer "over the school's public address system prior to each football and baseball game **[***309]** coerces student participation in religious events." [8] Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the *Establishment Clause*. The Court of Appeals majority agreed with the Does.

7 "The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these prayers during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the *Establishment Clause*." App. to Pet. for Cert. E8.

8 *Id.* at E8-E9.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist., 977 F.2d 963 (1992)*, that court held that student-led prayer that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school **[*300]** graduations and that school-encouraged prayer was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist., 70 F.3d 402 (1995)*, it had described a high school graduation as "a significant, once in-a-lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." *Id. at 406-407.* [9]

9 Because the dissent overlooks this case, it incorrectly assumes that a "prayer-only policy" at football games was permissible in the Fifth Circuit. See *post,* at 6-7.

In its opinion in this case, the Court of Appeals explained:

"The controlling feature here is the same as in *Duncanville:* The prayers are to be delivered *at football games* -- hardly the sober type of annual event that can be appropriately solemnized with prayer. The distinction to which [the District] points is simply one without difference. Regardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that [the District's] alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions." *168 F.3d at 823.*

The dissenting judge rejected the majority's distinction between graduation ceremonies and football games. In his **[*301]** opinion the District's October policy created a limited public forum that had a secular purpose [10] and provided neutral accommodation **[***310]** of noncoerced, private, religious speech. [11]

10 "There are in fact several secular reasons for allowing a brief, serious message before football games -- some of which [the District] has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.

"Having again relinquished all editorial control, [the District] has created a limited public forum for the students to give brief statements or prayers concerning the value of those goals and the methods for achieving them." *168 F.3d at 835.*

11 "The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious speech." *Id. at 836.*

[2275]** We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the *Establishment Clause*." *528 U.S. 1002 (1999).* We conclude, as did the Court of Appeals, that it does.

II

[*LEdHR3]** [3]The first Clause in the *First Amendment to the Federal Constitution* provides that "Congress shall make no law respecting an establishment

of religion, or prohibiting the free exercise thereof." The *Fourteenth Amendment* imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Wallace v. Jaffree, 472 U.S. 38, 49-50, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)*. In *Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992)*, we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different **[*302]** type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.

[*LEdHR4]** [4]As we held in that case:

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the *Establishment Clause*. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id. at 587* (citations omitted) (quoting *Lynch v. Donnelly, 465 U.S. 668, 678, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)*).

[*LEdHR1B]** [1B] **[***LEdHR5]** [5]In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the *Establishment Clause* forbids, and *private* speech endorsing religion, which the Free Speech and *Free Exercise Clauses* protect." *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990)* (opinion of O'CONNOR, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

[*LEdHR1C]** [1C] **[***LEdHR6A]** [6A] **[***LEdHR7]** [7]These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. **[***311]** We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995)*. Although the District relies heavily on *Rosenberger* and similar cases involving such **[*303]** forums, [12] it is clear that the pregame ceremony is not the type of forum discussed in those cases. [13] **[**2276]** The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." *Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 270, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)* (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)*). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message, see *infra*, at 14-15, 17. By comparison, in *Perry* we rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here. [14] As we concluded in *Perry*, "selective access does not transform government property into a public forum." *460 U.S. at 47*.

12 See, *e.g.*, Brief for Petitioner 44-48, citing *Rosenberger, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510* (limited public forum); *Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981)* (limited public forum); *Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995)* (traditional public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993)* (limited public forum). Although the District relies on these public forum cases, it does not actually argue that the pregame ceremony constitutes such a forum.

13 A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Estalishment Clause. See, *e.g.*, *Pinette, 515 U.S. at 772* (O'CONNOR, J., concurring in part and concurring in judgment) ("I see no necessity to carve out . . . an exception to the endorsement test for the public forum context").

14 The school's internal mail system in *Perry* was open to various private organizations such as "local parochial schools, church groups, YMCA's, and Cub Scout units." *460 U.S. at 39, n. 2.*

[*304] **[***LEdHR6B]** [6B]Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

[*LEdHR1D]** [1D]Recently, in *Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000)*, we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

"To the extent the referendum substitutes majority determinations **[***312]** for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here." *Id.* at __ (slip op., at 16-17).

Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. [15] Because "fundamental rights may not be **[*305]** submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943)*, the District's elections are insufficient safeguards of diverse student speech.

15 If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.

The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen." *Post,* at 5.

In *Lee*, the school district made the related argument that its policy of endorsing only "civic or nonsectarian" prayer was acceptable because it minimized the intrusion on the audience as a whole. We **[**2277]** rejected that claim by explaining that such a majoritarian policy "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." *505 U.S. at 594.* Similarly, while Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "'one of neutrality rather than endorsement'" [16] or by characterizing the individual student as the "circuit-breaker" [17] in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position." *505 U.S. at 590.*

16 Brief for Petitioner 19 (quoting *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 248, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990)* (plurality opinion)).

17 Tr. of Oral Arg. 7.

[*LEdHR8]** [8]The District has attempted to disentangle itself from the religious messages by developing the two-step student **[*306]** election process. The text of the October policy, however, exposes the

extent of the school's entanglement. [***313] The elections take place at all only because the school "board *has chosen to permit* students to deliver a brief invocation and/or message." App. 104 (emphasis added). The elections thus "shall" be conducted "by the high school student council" and "upon advice and direction of the high school principal." *Id. at 104-105.* The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.*

[***LEdHR1E] [1E] [***LEdHR9] [9] [***LEdHR10A] [10A]In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. [18] Indeed, the only type of message that is expressly endorsed in the text is an "invocation" -- a term that primarily describes an appeal for divine [*307] assistance. [19] In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely [**2278] how the students understand the policy. The results of the elections described in the parties' stipulation [20] make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony. [21] We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the *First Amendment.*

[***LEdHR10B] [10B]

18 THE CHIEF JUSTICE's hypothetical of the student body president asked by the school to introduce a guest speaker with a biography of her accomplishments, see *post,* at 9 (dissenting opinion), obviously would pose no problems under the *Establishment Clause.*

19 See, *e.g.,* Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a prayer of entreaty that is usually a call for the divine presence and is offered at the beginning of a meeting or service of worship").

20 See *supra,* at 4-5, and n. 4;

21 Even if the plain language of the October policy were facially neutral, "the *Establishment Clause* forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. at 777* (O'CONNOR, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534-535, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)* (making the same point in the Free Exercise context).

[***314] [***LEdHR11] [11]The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is [*308] clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "the board has chosen to permit" the elected student to rise and give the "statement or invocation."

[***LEdHR1F] [1F] [***LEdHR12] [12]In this context the members of the listening audience must

perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Wallace, 472 U.S. at 73, 76* (O'CONNOR, J., concurring in judgment); see also *Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995)* (O'CONNOR, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

[*LEdHR1G]** [1G] **[***LEdHR13]** [13]The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguish a sham secular purpose from a sincere one." *Wallace, 472 U.S. at 75* (O'CONNOR, J., concurring in judgment).

[*309] **[***LEdHR14]** [14]According to the District, the secular purposes of the policy are to "foster free expression of private persons . . . as well [as to] solemnize sporting events, promote good sportsmanship and student safety, and establish an appropriate environment **[**2279]** for competition." Brief for Petitioner 14. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foster free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity **[***315]** is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet non-religious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee, 505 U.S. at 596.*

[*LEdHR1H]** [1H] **[***LEdHR15]** [15]School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants "that they are outsiders, not full members of the political community, and an accompanying **[*310]** message to adherants that they are insiders, favored members of the political community." *Lynch v. Donnelly, 465 U.S. at 688 (1984)* (O'CONNOR, J., concurring). The delivery of such a message -- over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer -- is not properly characterized as "private" speech.

III

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

[*LEdHR1I]** [1I] **[***LEdHR16A]** [16A]The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument

exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was "whether a student would deliver prayer at varsity football games," App. 65, and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

[*LEdHR1J]** [1J] **[***LEdHR16B]** [16B] **[***LEdHR17]** [17]One of the purposes served by the *Establishment Clause* is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the "preservation and transmission of religious beliefs and worship is a **[***316]** responsibility and a choice committed to the private sphere." *505 U.S. at 589.*The two student elections authorized **[*311]** by the policy, coupled with **[**2280]** the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the *Establishment Clause*. Although it is true that the ultimate choice of student speaker is "attributable to the students," Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee, 505 U.S. at 587.*

[*LEdHR18]** [18]The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Brief for Petitioner 41. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

[*LEdHR1K]** [1K] **[***LEdHR19A]** [19A]There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, "law reaches past formalism." *505 U.S. at 595.* To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." *Ibid.* We stressed in *Lee* the **[*312]** obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id. at 593.* High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "it is a tenet of the *First Amendment* that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id. at 596.*

[*LEdHR1L]** [1L] **[***LEdHR19B]** [19B] **[***LEdHR20]** [20]Even if we regard every **[***317]** high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id. at 594.* As in *Lee*, "what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id., at 592.* The constitutional command will not permit the District "to exact religious conformity from a student as the **[**2281]** price" of joining her classmates at a varsity football game. [22]

22 "We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It

fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the *Establishment Clause of the First Amendment* is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands." *Lee, 505 U.S. at 595-596.*

[*313]

[*LEdHR21]** [21] **[***LEdHR22]** [22]The Religion Clauses of the *First Amendment* prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 395, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990); Wallace v. Jaffree, 472 U.S. 38, 59, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985).* Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel v. Vitale, 370 U.S. 421, 430, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962).* Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

IV

[*LEdHR2B]** [2B]Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship **[*314]** because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which **[***318]** *Establishment Clause* values can be eroded," *Lynch, 465 U.S. at 694* (O'CONNOR, J., concurring), and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

[*LEdHR2C]** [2C] **[***LEdHR23A]** [23A]The District argues that the facial challenge must fail because "Santa Fe's Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Brief for Petitioner 17 (quoting *Bowen v. Kendrick, 487 U.S. 589, 613, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988)).*Our *Establishment Clause* cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen,* THE CHIEF JUSTICE concluded that "as in previous cases involving facial challenges on *Establishment Clause* grounds, *e.g., Edwards v. Aguillard, [482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)]; Mueller v. Allen, 463 U.S. 388,* **[**2282]** *77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983),* we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) . . . .* which guides 'the general nature of our inquiry in this area,' *Mueller v. Allen, supra, at 394.*" *487 U.S. at 602.* Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." *Lemon v. Kurtzman, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971).* It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

[*LEdHR2D]** [2D] **[***LEdHR23B]** [23B]

As discussed, *supra,* at 14-15, 17, the text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement

in both the election of the speaker **[*315]** and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message -- that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

[*LEdHR23C]** [23C] **[***LEdHR24]** [24]This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the *Establishment Clause*. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the *Establishment Clause* is "in large part a legal question to be answered on the basis of judicial interpretation of social facts . . . . Every government **[***319]** practice must be judged in its unique circumstances . . . ." *Lynch, 465 U.S. at 693-694* (O'CONNOR, J., concurring). Our discussion in the previous sections, *supra,* at 15-18, demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits.

[*LEdHR2E]** [2E]The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly -- that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

[*316] **[***LEdHR2F]** [2F] **[***LEdHR25]** [25]Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace*, for example, we invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." *472 U.S. at 60*; see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)*.Therefore, even if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue. Government efforts to endorse religion cannot evade constitutional **[**2283]** reproach based solely on the remote possibility that those attempts may fail.

[*LEdHR2G]** [2G]This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. [23] Like the referendum in *Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 146 L. Ed. 2d 193, 120 S. Ct. 1346* **[*317]** *(2000)*, the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion **[***320]** to a majoritarian vote, a constitutional violation has occurred. [24] No further injury is required for the policy to fail a facial challenge.

[*LEdHR2I]** [2I]

23 THE CHIEF JUSTICE accuses us of "essentially invalidating all student elections," see *post,* at 5. This is obvious hyperbole. We have concluded that the resulting religious message under this policy would be attributable to the school, not just the student, see *supra,* at 9-18. For

this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the *Establishment Clause*.

24 THE CHIEF JUSTICE contends that we have "misconstrued the nature . . . [of] the policy as being an election on 'prayer' and 'religion,'" see *post*, at 3-4. We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver *prayer* at varsity football games," that the "students chose to allow a student to say a *prayer* at football games," and that a second election was then held "to determine which student would deliver the *prayer*." App. 65-66 (emphases added). Furthermore, the policy was titled "*Prayer* at Football Games." *Id. at 99* (emphasis added). Although the District has since eliminated the word "prayer" from the policy, it apparently viewed that change as sufficiently minor as to make holding a new election unnecessary.

[*LEdHR2H]** [2H] **[***LEdHR23D]** [23D]To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum," *Pinette, 515 U.S. at 780* (O'CONNOR, J., concurring in part and concurring in judgment). Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

DISSENT BY: REHNQUIST

DISSENT

[*318] CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the *Establishment Clause*. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the *Establishment Clause*, when it is recalled that George Washington himself, at the request of the very Congress which passed the *Bill of Rights*, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty **[**2284]** God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*, the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." See also *Bowen v. Kendrick, 487 U.S. 589, 612, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988)*. While there is an exception to this principle in the *First Amendment* overbreadth context because of our concern that people may refrain from speech out **[***321]** of fear of prosecution, *Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, , 145 L. Ed. 2d 451, 120 S. Ct. 483 (1999)* (slip op., at 5-7), there is no similar justification for *Establishment Clause* cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question is not whether the district's policy *may be* applied in violation of the *Establishment Clause*, but whether it inevitably will be.

[*319] The Court, venturing into the realm of prophesy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante*, at 24. To do so, it applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*. [1]

1 The Court rightly points out that in facial challenges in the *Establishment Clause* context, we have looked to *Lemon*'s three factors to "guide

the general nature of our inquiry." *Ante*, at 22-23 (internal quotation marks omitted) (citing *Bowen v. Kendrick, 487 U.S. 589, 602, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988))*. In *Bowen*, we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "it has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." *487 U.S. at 612* (internal quotation marks omitted). But here the Court, rather than look to *Lemon* as a guide, applies *Lemon*'s factors stringently and ignores *Bowen*'s admonition that mere anticipation of unconstitutional applications does not warrant striking a policy on its face.

Lemon has had a checkered career in the decisional law of this Court. See, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398-399, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993)* (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace v. Jaffree, 472 U.S. 38, 108-114, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)* (REHNQUIST, J., dissenting) (stating that *Lemon*'s "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 671, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1980)* (STEVENS, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*"). We have even gone so far as to state that it has never been binding on us. *Lynch v. Donnelly, 465 U.S. 668, 679, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* ("We have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area . . . . In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh* **[*320]** *v. Chambers, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983)*, and *Larson v. Valente, 456 U.S. 228, 72 L. Ed. 2d 33, 102 S. Ct. 1673 (1982)*"]). Indeed, in *Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992)*, an opinion upon which the Court relies heavily today, we mentioned but did not feel compelled to apply the *Lemon* test. See also *Agostini v. Felton, 521 U.S. 203, 233, 138 L. Ed. 2d 391, 117 S. Ct. 1997* **[**2285]** *(1997)* (stating that *Lemon*'s entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair, 413 U.S. 734, 741, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)* (stating that the *Lemon* factors are "no more than helpful signposts").

Even if it were appropriate to apply **[***322]** the *Lemon* test here, the district's student-message policy should not be invalidated on its face. The Court applies *Lemon* and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Ante*, at 26. The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion." [2] See *ante*, at 22, 26. To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. App. 104-105. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will **[*321]** pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the *Establishment Clause* or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions. [3]

2 The Court attempts to support its misinterpretation of the nature of the election process by noting that the district stipulated to facts about the most recent election. See *ante*, at 25, n. 24. Of course, the most recent election was conducted under the *previous* policy -- a policy that required an elected student speaker to give a pregame invocation. See App. 65-66, 99-100.

There has not been an election under the policy at issue here, which expressly allows the student speaker to give a message as opposed to an invocation.

3 The Court's reliance on language regarding the student referendum in *Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000)*, to support its conclusion with respect to the election process is misplaced. That case primarily concerned free speech, and, more particularly, mandated financial support of a public forum. But as stated above, if this case were in the "as applied" context and we were presented with the appropriate record, our language in *Southworth* could become more applicable. In fact, *Southworth* itself demonstrates the impropriety of making a decision with respect to the election process without a record of its operation. There we remanded in part for a determination of how the referendum functions. See *id.* at __ (slip op., at 16-17).

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." *Ante*, at 25. The Court so holds despite that any speech that may occur as a result of the election process here would be *private*, not *government*, speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say **[***323]** prayers. Under the Court's view, the mere grant of power **[*322]** to the students to vote for such **[**2286]** offices, in light of the fear that those elected might publicly pray, violates the *Establishment Clause*.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Ante*, at 24. But the policy itself has plausible secular purposes: "To solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104-105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace, supra, at 74-75* (O'CONNOR, J., concurring in judgment); see also *Mueller v. Allen, 463 U.S. 388, 394-395, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983)* (stressing this Court's "reluctance to attribute unconstitutional motives to States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). The Court grants no deference to -- and appears openly hostile toward -- the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante*, at 14; Cf. *Lynch, 465 U.S. at 693* (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante*, at 14. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.'" Under the Court's logic, a public school that sponsors **[*323]** the singing of the national anthem before football games violates the *Establishment Clause*. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the *Establishment Clause* prevents them from making this choice. [4]

4 The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante*, at 14-15. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the *Free Exercise Clause* mandates such tolerance. See *ante*, at 21 ("Nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch v. Donnelly, 465 U.S. 668, 673, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* ("Nor does the Constitution require complete separation of church and state; it

affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district's history of *Establishment Clause* violations and the context in which the policy was written, that is, as "the latest step in **[***324]** developing litigation brought as a challenge to institutional practices that unquestionably violated the *Establishment Clause*." *Ante*, at 16, 17, and 22. But the context -- attempted compliance with a District Court order -- actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a prayer-only policy. See *Jones v. Clear Creek Independent School Dist., 977 F.2d 963 (CA5 1992)*. But the school district went further than required by the District Court order and eventually settled **[**2287]** on a policy that gave the student speaker a choice to deliver either an **[*324]** invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, *Establishment Clause* restrictions. Thus, the policy cannot be viewed as having a sectarian purpose. [5]

5 *Wallace v. Jaffree, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)*, is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to prayer to an existing statute providing a moment of silence for meditation. *Id. at 59*. Here the school district added a secular alternative to a policy that originally provided only for prayer. More importantly, in *Wallace*, there was "unrebutted evidence" that pointed to a wholly religious purpose, *id. at 58*, and Alabama "conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity," *id. at 77-78* (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

The Court also relies on our decision in *Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992)*, to support its conclusion. In *Lee*, we concluded that the content of the speech at issue, a graduation prayer given by a rabbi, was "directed and controlled" by a school official. *Id. at 588*. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the *Establishment Clause* forbids, and *private* speech endorsing religion, which the Free Speech and *Free Exercise Clauses* protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990)* (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria -- like good public speaking skills or social popularity -- and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy **[*325]** would likely pass constitutional muster. See *Lee, supra, at 630, n. 8* (SOUTER, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or **[***325]** be considered one that endorses religion. See *ante*, at 14. This is undoubtedly a new requirement, as our *Establishment Clause* jurisprudence simply does not mandate "content neutrality." That concept is found in our *First Amendment speech* cases and is used as a guide for determining when we apply strict scrutiny. For example, we look to "content neutrality" in reviewing loudness restrictions imposed on speech in public forums, see *Ward v. Rock Against Racism, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)*, and regulations against picketing, see *Boos v. Barry, 485 U.S. 312, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988)*. The Court seems to think that the fact that the policy is not content neutral somehow controls the *Establishment Clause* inquiry. See *ante*, at 14.

But even our speech jurisprudence would not require that all public school actions with respect to

student speech be content neutral. See, *e.g.*, *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)* (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). **[**2288]** Schools do not violate the *First Amendment* every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations **[*326]** prohibit the student body president from giving a solemn, yet non-religious, message like "commentary on United States foreign policy." See *ante*, at 14.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.